Baldus and the limits of representation

Baldus and the Limits of Agency*

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Most contributions on agency and representation in medieval law tend to look at collegiate offices, not individual ones: when, how and to what extent can a plurality of people be represented by a single individual. For individual offices - that is, offices not representing a collectivity - the approach was typically another. From the king to the magistrate, the office was not necessarily viewed as a different subject from that of the individual person discharging it, but rather construed as a series of powers vested in that person.
Influenced by canon lawyers (chiefly, Innocent IV), Baldus de Ubaldis on the contrary approached the individual office in the same way as the collegiate one. Irrespectively of whether the office represented a plurality of people or designated a single individual, it remained a different subject from the person who exercised it. Construing the relationship between person and individual office in terms of agency provides a more penetrating insight into the dynamics of agency, which the 'standard' representation (the relationship between individual person and collectivity) sometimes fails to provide. Looking at the relationship between agent and individual office in the thought of Baldus, this contribution focuses on the limits within which the person of the agent can represent the office and act in its name. Just as the presence of lawful representation does not always allow the exercise of the office, so the lack of representation does not necessarily preclude the possibility of discharging it validly. Building on Innocent IV (but much unlike him), Baldus distinguishes between internal and external validity of agency. Because of this difference, the relationship between office and third parties does not always depend on that between office and agent. To reach this distinction, we will examine four degrees of separation between agent and office in Baldus' thought. First, obligations of the person vs. obligations of the office. Second, individual offices vs. collegiate bodies. Third, obligations that cannot be imputed to the office despite the full validity of its representative. Fourth, obligations that can be imputed to the office despite the lack of valid agency.
A final note on terminology: from a strictly legal point of view, it would have been more correct to speak of representation, not of agency. The different choice is due to the simple fact that this work is largely focused on the distinction between agent and principal and the difference between internal and external validity of agency.

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1. Introduction

While not entirely neglected, the approach of medieval jurists to corporation theory has perhaps not received overwhelming attention among legal historians. This ultimately depends on the combination of two factors. On the one hand, looking at medieval civil law as a continuation of sort of Roman law. On the other, the predilection for Roman private law and the comparatively low interest in its public

law dimension.[1] Just as Roman law typically means Roman private law, so the study of medieval civil law usually focuses on private law issues. Those scholars who studied medieval corporation theory, in turn, seldom went beyond collegiate bodies. As a result, the (legal) analysis of individual offices has been almost entirely neglected. For the present purposes the term 'individual office' refers to any public office that does not designate and represent a collectivity or plurality of subjects, but a single one, such as the king, the judge, and so on.

Most medieval jurists (civilians in particular) proved rather reluctant to extend agency to individual offices. Individual offices were typically considered as a series of powers vested in a person, not as a different person from that of the agent. Thus, agent and individual typically coincided, and this allowed to dispense with agency altogether. Corporations were different. There, the distinction between person and office was both conceptually more evident and, especially, clearly visible in practice. Moreover, this distinction was necessary. The late medieval urban world is a system of corporations. The jurists themselves typically lived in a city, and often a self-governing one. Hence their interest in the mechanism of representation: how could the actions of the single be ascribed to the whole.[2] To provide a legal (and logical) basis

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* The subject of this essay touches on some questions also discussed in a much broader work, *Representation and Ostensible Authority in Medieval Learned Law*, forthcoming in *Studien zur europäischen Rechtsgeschichte* (Max-Planck-Institute for Legal History, Frankfurt-am-Main). I wish to thank Boudewijn Sirks, Peter Oestmann, Luca Loschiavo, Orazio Condorelli, Susanne Lepsius and Vincenzo Colli for their generous help, encouragement and advice. I am also grateful to the editors of the *Tijdschrift voor Rechtsgeschiedenis* for their suggestions, which have much improved this work, and the Carnegie Trust for the Universities of Scotland for its support. The usual disclaimer applies.

[1] Cf. S. Lepsius, *Prätor und Prokonsul: Übersetzungsleistungen und Neuschöpfungen der mittelalterlichen Legisten im Umgang mit den römischen Ämtern*, in J. Krynen and M. Stolleis (eds.), *Science politique et droit public dans les facultés européennes (XIIIe-XVIIIe siècle),* Frankfurt-am-Main 2008, pp. 223-250, esp. 226. After all, the long-lasting partnership between Roman and modern private law is the main reason why Roman law is still taught - often in homeopathic dosage - in many European universities today.

[2] For a few essential references to a vast subject see P. Michaud-Quantin, *Universitas. Expressions du Mouvement Communautaire dans le Moyen Âge Latin*, Paris 1970, pp. 305-326; H. Coing, *Europäisches Privatrecht*, vol. 1, München 1985, pp. 262-268; J. Quillet, *Universitas populi et Représentation au XIV^o^ siècle*, in A. Zimmerman (ed.), *Der Begriff der repraesentatio im Mittelalter. Stellvertretung, Symbol, Zeichen, Bild*, Berlin 1971, pp. 186-201, at 186-189; K. Nörr, *Zur Frage des subjektiven Rechts in der Mittelalterlichen Rechtswissenschaft*, in D. Medicu, H.-J. Mertens, K.W. Nörr and W. Zöllner (eds.), *Festschrift für Hermann Lange zum 70. Geburtstag*, Stuttgart-Berlin-Köln 1992, pp. 193-204, at 194-197; B. Tierney, *Corporatism, Individualism, and Consent: Locke and Premodern Thought*, in M.E. Eichbauer and K. Pennington (eds.), *Law as Profession and Practice in Medieval Europe: Essays in Honor of James A. Brundage,* Ashgate 2011; reprint, Abingdon 2016, pp. 49-72, at 62-63; A. Black, *Guild and State. European Political Thought from the Twelfth Century to the Present*, revised edn., London 2003, pp. 16-31; I. Birocchi, *Persona giuridica nel diritto medioevale e moderno*, in *Digesto delle discipline privatistiche*, *Sezione civile*, vol. 13, Roma 1995, pp. 408-420, esp. 414-5; E. Cortese, *Il diritto nella storia medievale*, Roma 1995, vol. 2, pp. 238-240; F. Todescan, *Dalla "Persona Ficta" alla "Persona Moralis",* 11/12 (1982/83) *Quaderni Fiorentini per la storia del pensiero giuridico italiano*, pp. 59-93, esp. 63-64; H. Hofmann, *Repräsentation. Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert*, Berlin 1974, pp. 152-165; F. D'Urso, *Persona giuridica e responsabilità penale. Note storico-giuridiche a proposito di recenti riforme*, 29 (2000) *Quaderni Fiorentini*, pp. 511-550, esp. 524-531 and 542-548.

On Bartolus in particular (and especially his comment on Dig.48.19.16.10) see H. Walther, *Die Konstruktion der juristischen Person durch die Kanonistik im 13. Jahrhundert*, in G. Mensching (ed.), *Selbstbewusstsein und Person im Mittelalter,* Würzburg 2005, pp. 195-212, at 196-200, and U. Navarrete, *La posesión de las "universitates" especialmente en caso de extinción de todos sus mienabros, según Bartolo,* in D. Segoloni *et al.* (eds.), *Bartolo di Sassoferrato. Studi e documenti per il VI centenario,* Milano 1962, vol. 2, pp. 347-372 at 351-360. Although the main jurists of the School of Orléans did not use the term *persona representata*, the concept behind it may be easily found also

for this mechanism, civilians progressively turned to canon law, borrowing an increasing number of principles thought for canonical elections, and applying them to the secular sphere.
If civil lawyers did look at the concept of agency, they focused mainly on those instances where the principal was a collectivity, paying considerably less attention to individual offices. More than legal, the reason for this difference seems ultimately logical. Construing both individual offices and collegiate bodies as different subjects from those of their physical representatives would strike only a modern as something quite natural to do. Without the benefit of hindsight, there is no reason why we should take for granted the similarity between the representative of a collectivity and the bearer of an individual office, and so expect that also medieval lawyers would have studied both cases in terms of agent-principal relationship.
This is the reason why these pages will focus on Baldus de Ubaldis: it is mainly with him that the distinction between person and office was fully worked out also for individual offices. Baldus did not invent this distinction, but rather applied to civil law some principles elaborated in canon law, especially by the great pope-lawyer Innocent IV. In so doing, however, he went beyond canon lawyers - and Innocent in particular. In retrospect, we could perhaps even say that what Innocent began, Baldus brought to conclusion. As it often happens, however, the continuity is only apparent: building on Innocent, Baldus went not just beyond the pope, but also against him. If Innocent highlighted the difference between person and individual office, Baldus managed to oppose one to the other, denying validity to the acts of the lawful agent when they clashed with the office he represented, and even allowing the office to act validly towards third parties when the agent lacked full legitimation to represent it. This way, Baldus introduced the difference between internal and external validity of agency.

2. *Dignitas* and agency

To appreciate the relationship between agent and office in Baldus, we should start with the concept of *dignitas*. *Dignitas* has two different meanings - or rather, two different objects: it can be referred both to an office and to a person. This is still visible in modern English, where the term 'dignity' means both the quality of being worthy of honour and a honourable position. The two meanings are complementary: only someone worthy of honour should occupy a honourable position; in turn, the honourable position attests to the honour of its holder. This circularity depends on the complexity of the concept of *dignitas* as applied to a person, for it means at the same time worthiness and aptitude - both the ethical condition of the person and his legal capacity to receive or hold something.[3]

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there. On the subject the main work is still that of R. Feenstra, *L'histoire des fondations. À propos de quelques études récentes*, 24 (1956) *Tijdschrift voor Rechtsgeschiedenis*, pp. 381-448. Feenstra also provides a critical edition of the lengthy passage of Révigny's *lectura* on Dig.3.4.7.2 from the only two known manuscripts of Révigny's *lectura* on the Vetus (Leiden, University Library, MS d'Ablaing 2, and Napoli, Biblioteca nazionale, MS Branc.III.A.6), *ibid.,* pp. 425-7. From Révigny's text it clearly appears that the term *persona representata* was already used by his teacher Jean de Monchy (*ibid*., p. 428). While Feenstra does not mention Guido de Cumis (but he does refer to Belleperche, especially his comment on Cod.1.3.31(32), *ibid.,* p. 424), also Cumis was familiar with the concept of corporation: see esp. his *lectura* on Dig.3.4.7, partly transcribed in F. D'Urso, *loc. cit.,* p. 530, note 56.

[3] G. Rossi, *Indignitas, Heresy and Schism: Canon Law and the iurisdictio of the mali pastores* 129 (2012) *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Kanonistische Abteilung, pp. 149-173, at 150-152, where further literature.

While complex, *dignitas* remains a single concept, whose ethical and a legal meanings complement each other. The medieval world fully accepted the Pauline argument that any power is ordained by God[4] - both in the sense that it comes from God and that its specific hierarchical position depends on His will. It was not difficult for the medieval jurists to apply this argument to the Roman sources: slightly revised, they seemed just to confirm it. Roman law was the product of a society of unequals, where it was perfectly normal that the *dignores* would occupy a higher position in society. Their social privileges, importantly, were at the same time legal ones. The medieval re-interpretation of Roman law through the lens of Christian thought justified the social hierarchy in terms of authority (the will of God), and provided a rational explanation for it in terms of superior moral qualities of those higher up the social ladder.

2.1 *Dignitas*: worthiness and aptitude

While the concept of *dignitas* is vast, we will focus only on what Baldus says. To do so, we shall look at some practical examples of the combination between moral and legal elements of *dignitas*, as referred both to persons and offices.

Let us take the title of the Digest on senators (by definition the highest Roman class). The Romans considered of consular rank both men and women (their wives). Nonetheless, a man of consular rank would clearly take precedence over a woman of the same rank (Dig.1.9.1).[5] In his comment on this text Baldus notes that 'the man is worthier (*dignor*) than the woman'.[6] And he goes on immediately to apply this moral distinction of *dignitas* to legal scenarios. The *patronus* of an ecclesiastical benefice normally has the right to present a cleric to the bishop to be appointed to that benefice when it becomes vacant. What happens, asks Baldus, in case of disagreement between the heirs of the patron as to the next cleric to present to the bishop? If the heirs are a son and a daughter, then the solution is simple: 'the voice of the man is to be preferred to that of the woman, because it is worthier'.[7] A clear consequence of this higher *dignitas* of the man, Baldus continues, is the *lex Salica*, providing for the agnatic succession to the throne.[8] It is difficult to find a stronger link between subjective and objective meanings of *dignitas*.

Dignitas, as said, does not refer only to persons, but also to offices. And the same dialectic between moral and legal qualities informing the personal *dignitas* may also

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[4] Rom. 13:1: 'non est potestas nisi a Deo; quae autem sunt, a Deo ordinatae sunt'. Cf. Aquinas, *Super Epistolas S. Pauli lectura* (R. Cai ed., Taurini-Romae 1953), vol. 1, c. 13, lect. 1, § 1021, p. 190. The literature on the medieval reading of the Pauline passage is bountiful. As to its application to our subject, see for all P. Costa, *Iurisdictio: semantica del potere politico nella pubblicistica medievale: 1100-1433*, Milano 1969, pp. 383-385.

[5] Different senatorial ranks depended on the importance of the highest magistracy discharged by a senator, so for instance a man of consular rank took precedence over a man of praetorian rank, and so on. Since the rank of the woman was determined by association with that of her husband, another issue discussed in the same text of Dig.1.9.1 (Ulp. 62 ed.) was whether a woman of consular rank should take precedence over a man of prefectorial rank. Ulpian was for the opposite conclusion, 'because of the greater *dignitas* of the male sex' (*quia maior dignitas est in sexu virili*). A few more of such cases may be found in B.W. Frier and T.A.J. McGinn (eds.), *A Casebook on Roman Family Law,* Oxford 2004, pp. 97-98. On senatorial ranks (especially on the consular rank) see further F.X. Ryan, *Rank and Participation in the Republican Senate,* Stuttgart, 1998, pp. 137 ff.

[6] Baldus, *ad* Dig.1.9.1 § *Consulari* (*Baldi Vbaldi Pervsini ... In Primam Digesti Veteris Partem Commentaria* ... Venetiis [apud Iuntas], 1577*, fol.* 49*va*, n. 1): 'Dignior est vir quam foemina'.

[7] *Ibid*.: 'Item facit quod si patronus ecclesiae decessit superstite filio, et filia, et discordant in presentando quod debet preferri voc masculi tanquam dignior.'

[8] *Ibid*., *fol.* 49*va*, n. 2.

be found in the concept of office as *dignitas*. Going back to the 'worthier voice' of the man, an excellent example may be found in the text immediately following it in the sources. It refers to the case of a senator expelled from the senate for his unworthiness (*ex turpitudine*). This ex-senator in disgrace is not allowed to judge or give witness. On the basis of that text, Baldus wonders whether the supervening *indignitas* should also prevent someone from deposing as witness.[9] For being witness 'is itself a *dignitas*'.[10] Depending on its owner, a voice may be worthier (*dignor*) than another. Applied to a specific legal function, the same voice becomes an office (*dignitas*). The higher *dignitas* of the man explains why in some countries the supreme *dignitas* - that of the Crown - is precluded to those less worthy (women). The higher the office (*dignitas*) the higher the worthiness (*dignitas*) needed to discharge it. Stated in more abstract terms, 'quality is not without a subject, and those worthier (*dignores*) ought to be preferred'.[11]

If *dignitas* is both a personal quality, a legal requirement and an office, then - going back to the imagine of the worthier voice - the voice is even stronger when its possessor occupies an office himself. So, Baldus argues, the testimony of 'that who holds an office' (*qui est in dignitate*) is stronger than that of who does not.[12] This is both because holding a *dignitas* (office) attests to the *dignitas* (worthiness) of its holder, and because the deposition is not just that of the person, but of the same *dignitas* of the office.

On the same basis, Baldus could easily argue that 'the worthier should occupy a higher rank', which is in its turn determined by its closeness to the higher authority - in the specific case, the proconsul.[13] Only the worthiest person may confer the highest dignities - that is, the prince (who in turn occupies the highest *dignitas* of all).[14] The higher the *dignitas* of the office, the higher the personal *dignitas* that is required to hold it. Since the higher rank is worthier, its incumbent should possess a higher *dignitas* in moral, social and legal terms - for each of them both requires and explains the others. Their inner connection is made visible by the fact that the holder of a superior *dignitas* should not only be worthier (*dignor*), but also appear such. So, for example, the abbot should be dressed better than the simple monk because, as Baldus explains, he is worthier (*dignor*) than him.[15] Referred to a person, *dignitas* is ultimately a question of proportionality between moral worthiness and legal aptitude. When the person holds an office, the same question of proportionality arises: the

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[9] Witnesses enjoyed different degrees of attendibility according to their *dignitas*, so the judge had to assess ‘quanta fides adhibenda sit testibus, qui et cuius dignitatis et cuius existimationis sint’ (Bartolus, *Tractatus testimoniorum*, in *Bartoli a Saxoferrato, Consilia, Quaestiones, & Tractatus* ... Basileae, ex officina Episcopiana, 1588, p. 436, n. 2).

[10] Baldus, *ad* Dig.1.9.2 § *Cassius Longinus* (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 49*vb*, n. 2): 'Item testimonium est dignitas i(d est) status illaesus absque macula'.

[11] Baldus, *ad* Inst.1.2.12 § *Omnem autem ius* (*Baldi Vbaldi Pervsini ... Praelectiones in quatuor Institutionum libros* ..., Venetiis, 1577, *fol.* 5*va*, n. 1): 'Ius commune ad personas, res vel actiones spectat; et qualitas non est sine subiecto, et dignores praeferendi sunt'.

[12] Baldus, *ad* Dig.22.5.3pr, § *Testium fides* (*Baldi Vbaldi pervsini Ivrisconsvlti ... In Secundam Digesti vet*[*eris*] *partem Commentaria* ... Venetiis [apud Iuntas], 1577, *fol.* 179*va*, n. 1): 'magis creditur ei, qui est in dignitate, quam ei qui non est in dignitate'.

[13] Baldus, *ad* Dig.1.16.4.3, § *Antequam vero* (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 62*ra*, n. 3): 'dignores debent altiori loco sedere, et altior locus est, qui est domino magis propinquus'.

[14] Baldus, *ad* Dig.2.1.3, § *Imperium* (*ibid., fol.* 73*ra*, n. 7): 'solus Princeps confert magnas dignitates'.

[15] Baldus, *ad* Dig.7.1.15.2, § *Sufficienter* (*ibid., fol.* 317*vb*, n. 2): 'abbas debet esse melius vestitus quam monachus, quia dignor'.

personal *dignitas* (in both its meanings) must be commensurate to the *dignitas* of the office.
This correspondence between inner and outer *dignitas* points to the symmetry between *dignitas* of the person and *dignitas* of the office. The point is crucial. To understand it, we might want to look at a paradox discussed in the Gloss, which clearly summed up a typical *disputatio*. The emperor is unworthy (*indignus*) of being a simple governor (*praeses*). The office of the governor is clearly below that of the emperor. But if the emperor is not worthy of being a governor, does that mean that he is even less worthy (*indignor*) of the empire? The answer was of course negative: it was the lower *office* of the governor to be unworthy of the *person* of the prince, not the contrary.[16] But the argument used in the paradox is interesting: the incompatibility between lower rank of the office and higher status of the person implies that also the office had a *dignitas*, which could be described both in terms of worthiness and of aptitude. Baldus devotes much attention to this gloss, providing even clearer examples: 'the pope is not worthy (*dignus*) of being chaplain', just the way 'Caesar is not worthy (*dignus*) to be a decurion'.[17] These two examples capture well the relationship between worthiness and aptitude of the person, and their reflection on the office. Moral worthiness entails legal aptitude, and vice versa: the suitability to discharge a certain office also impacts on the moral worthiness of its holder, for it measures it. Fitness to a position almost quantifies moral worthiness. Pope and emperor would be 'overqualified' for those minor offices - and so not suited to occupy them. Doing otherwise would be unworthy of their *dignitas*: hence the association often found in medieval jurists between *dignitas* and *idoneitas*.[18] In a world of *potestates ordinatae*, the specific position of each person attests to a certain degree of personal worthiness. The *dignitas* of the office should be commensurate with the *dignitas* of the person that holds it. Pope and emperor are not worthy of lower offices because the *dignitas* of such offices is itself lower than that of their person - their moral worthiness, and so legal aptitude. Those lower offices are not able to accommodate the supreme dignities of pope and emperor. The term chosen by Baldus to signify this inability is 'non capax'. Just as 'capacity' in modern English, *capax* meant both ability and spaciousness. Just as a lower *dignitas* is not 'spacious' enough to accomodate the 'size' of the supreme *dignitas*, it would be unworthy of the higher *dignitas* to be 'squeezed' into a lower one.

2.2. Agent and office

[16] Gloss *ad* Dig.1.9.4, § *Qui indignus* (*Pandectarvm Ivris Civilis*, Parisiis, apud Gulielmum Merlin ... et Gulielmum Desboys ..., ac Sebastianum Niuellium ..., 1566, vol. 1, col. 120): '... Imperator indignus est quod sit praeses: ergo indignior imperio? Respon(deo) minores ordines sunt indigni eo: non ipse eis.'
[17] Baldus *ad* Dig.1.9.4, § *Qui indignus* (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 50*va*, n. 2): 'Opponit gl(osa) Papa non est dignus esse cappellanus, ergo non est dignus esse Papa. Respon(deo) omnia continet sub se dignitas suprema. Vel aliter, Papa non est dignus plebanus villae Canalis, ergo non est dignus papatu. nam illa est falsa: quia Papa dignus est, sed villa Canalis indigna, nec est tanti capax. Et idem in Imperatore: nam Caesar non est dignus esse Decurio, i(d est) decurionatus non est dignus Caesare, nec aliqua inferior dignitas ratione proportionis digna est amplecti quod supremus est'.
[18] Cf. Rossi, *Indignitas, Heresy and Schism* (note 3), p. 151. See more broadly J. Peltzer, *Idoneität. Eine Ordnungskategorie oder eine Frage des Rangs?*, in C. Ardenna and G. Melville (eds.), *Idoneität - Genealogie - Legitimation. Begründung und Akzeptanz von dynastischer Herrschaft im Mittelalter*, Köln-Weimar-Wien 2015, pp. 23-37. The reverse, as usual, is true: *inidoneitas* also means *indignitas*. See for all E. Peters, *The Shadow King. Rex Inutilis in Medieval Law and Literature,* New Haven-London 1970, esp. pp. 116-134.

Having briefly introduced the concept of *dignitas*, we might now turn our attention to the difference between agent and office in Baldus. To do so, it is possible to distinguish four levels, four degrees of separation between person and office. First, obligations of person vs. obligations of the office. Secondly, individual offices vs. collegiate bodies. Thirdly, individual offices held by their lawful representative but in a way that is unworthy of the office's *dignitas*. Fourth, individual offices discharged by an agent that is not fully legitimate to represent them.

The concept of legal person, it is well known, is largely the product of the elaboration of the canon lawyers,[19] among whom Innocent IV had a role second to none.[20] Baldus adapted that concept to secular matters, first and foremost to the notion of kingdom.[21] The image of the king as the guardian of the Crown is exceedingly well known. This image, however, is usually approached as a metaphor, not as a specific legal reference. Reisenberg for one famously observed how the description of the prince as a guardian allows to separate the 'abstraction of sovereignty' from 'its momentary possessor'.[22] Powerful and evocative as it is as a metaphor, however, we might approach that image also as a specific legal reference. Few medieval lawyers, apart from Cinus of Pistoia, were also great poets. In a legal discourse metaphors have legal consequences, for they are legal analogies. The description of the prince as guardian and the Crown as ward is often found in Baldus, especially in some of his more politically-oriented *consilia*. It was one of them to prompt Reisenberg's statement.[23] In that same *consilium,* shortly after the metaphor, Baldus looks at the passage in the Digest (Dig.34.9.22) where the difference between the person of the guardian and the quality of being guardian appears more clearly. That passage excludes the imputability of obligations, duties and liabilities assumed by the guardian in the exercise of the wardship to the guardian as a person. It is hardly fortuitous that in Roman law the punishment for the guardian's misconduct was precisely to lift this separation and impute those debts directly to the guardian as a person, condemning him to to pay for them out of his own pocket.

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[19] By and large, the discussion of canon lawyers focused on the corporation's decision-making process and on the scope (and limits) within which its representative could validly act on its behalf. On the subject the literature is vast. To give only a few references, the obvious starting point is the work of B. Tierney, *Foundations of the Conciliar Theory. The Contribution of the Medieval Canonists from Gratian to the Great Schism*, (3rd edn.) Leiden 1998, pp. 98-117, of Y. Congar, *Quod omnes tangis, ab omnibus tractari et approbari debet*, 36 (1958) *Revue Historique de Droit Français et Étranger*, pp. 210-259, at 210-221 and 224-234, and of G. Post, *Studies in Medieval Legal Thought*, Princeton 1964, pp. 91-162. More recently see also K. Pennington, *Representation in Medieval Canon law*, 64 (2004) *The Jurist. Studies in church law and ministry*, pp. 361-383, esp. 365-375.

[20] See esp. A. Melloni, *Innocenzo IV. La concezione e l'esperienza della cristianità come regimen unius personae,* Genova 1990, pp. 101-131, where ample literature, esp. at 102-106; Id., *Ecclesiologia ed istituzioni. Un aspetto della concezione della cristianità di Innocenzo IV,* in S. Chodorow (ed.), *Proceedings of the Eighth International Congress of Medieval Canon* Law, Città del Vaticano 1992, pp. 285-307, at pp. 290-98. Cf. Tierney, *Foundations of the Conciliar Theory* (note 19), pp. 99-108, and, more recently, Walther, *Die Konstruktion der juristischen Person* (note 2), pp. 203-206. See also S. Panizo Orallo, *Persona jurídica y ficción: estudio de la obra de Sinibaldo de Fieschi (Inocencio IV)*, Pamplona 1975, pp. 227-342.

[21] On the point see esp. J. Canning, *The Political Thought of Baldus de Ubaldis*, Cambridge 1987; reprint, 1989, pp. 185-197. Most recently see also, *inter multos*, H. Tuner, *The Corporate Commonwealth. Pluralism and Political Fictions in England, 1516-1651*, Chicago-London 2016, pp. 18-20, and D. Lee *Popular Sovereignty in Early Modern Constitutional Thought*, Oxford 2016, pp. 74-77.

[22] P. Riesenberg, *Inalienability of Sovereignty in Medieval Political Thought,* New York 1956, p. 97.

[23] Baldus, cons.3.159 (Venetiis 1580), *infra*, note 31.

If there is a study on medieval political thought that is even more famous than that of Reisenberg, it is the work of Ernst Kantorowicz on the two bodies of the king. As an abstraction, the king never dies. It is the immortality of the Crown that explains (and, at the same time, strengthens) an otherwise bizarre custom - loudly exclaming 'the king is dead, long life to the king!'[24] In his study, Kantorowicz gave a masterful description of the image of the king as phoenix in Baldus.[25] Just as the emperor, there is only one phoenix at any given time. In the phoenix, single individual and abstract category coincide. This makes the metaphor even stronger: while the only living phoenix dies, the Phoenix does not. The strength of the metaphor makes it particularly appropriate to describe the relationship between king and Crown. As representative of the Crown, the previous individual to wear it is in no way different from the next - just as the new phoenix will be physically identical to the old one. The phoenix dies but at the same time it dies not, and so does the king.[26]

After this metaphor so full of poetry, Kantowowicz moves on. But we might want to continue examining the passage of Baldus to see what comes next. Poetry served a precise purpose: it introduced a legal concept with a metaphorical analogy. Immediately after the image of the phoenix, Baldus goes back to business. The legal proceedings entrusted to the office holder pass to the next incumbent, he observes, for the predecessor was not given the task as an individual but as representative of his office.[27] In their quality of representative of the office, old and new incumbent are precisely one and the same - just like the phoenix. If we were to leave aside political thought and focus on the 'legal side' of the phoenix, the question might well be: when the phoenix dies, does the mortgage on the nest pass on to the new bird? While doubtlessly suggestive, the image of the phoenix is invoked for a strictly legal purpose: nothing else has such perfect identity between old and new. The old phoenix *is* the new one. This identity implies full continuity, and requires to think not in terms

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[24] E. Kantorowicz, *The king's two bodies. A study in mediaeval political theology*, Princeton 1957; 6th reprint, 1981, cap. 6 and 7, esp. pp. 291-313, 318-342, and 409-413. For a detailed analysis of the scholarly literature dealing with this point see S. Meder, *Doppelte Körper im Recht. Traditionen des Pluralismus zwischen staatlicher Einheit und transnationaler Vielheit,* Tübingen 2015, pp. 46-47 and 49-53.

[25] Kantorowicz, last note, pp. 388-390.

[26] Baldus, *ad* X.1.29.14, *Quoniam abbas* (*Baldvs svper Decretalibvs* ... Lugduni, excudebat Claudius Seruanius, 1564, *fol.* 89*va*, n. 2): 'Dicit ber(nardus parmensis) quod dignitas non moritur sed persona quia indiuidua sepe pereunt quod summis dignitatibus non est concessus'.

[27] *Ibid., fol.* 89*vb*, n. 3: 'Dicit In(nocentius) quod quando causa committitur loco vel dignitati mortuo commissario vel remoto transit delegatio ad ipsam dignitatem.' Cf. Innocent IV, *ad* X1.29.14, § *Quoniam Abbas* (*Commentaria Innocentii Quarti Pont. Maximi Super Libros Quinque Decretalium,* Francofurti ad Moenum [Martin Lechler, Sigmund Feyerabend], 1570; anastatic reprint, Frankfurt am Main 1968, *fol.* 123*ra*, n. 1): 'successores procederent in causa, cum sit iurisdictio penes loca et dignitates, et non penes personas.' Because of this reason the new incumbent is considered the same person as the old one. Innocent elaborated further on the point in his discussion on the dispossession of the right to make an appointment. When the election was made by someone other than the rightful elector, he could demand its annulment. If he died, the faculty to demand the annulment would pass to his successor, because the prejudice was done not to him as a person, but rather to the office he represented. Hence the successor is considered (*fingitur*) one and the same person with his predecessor ('finguntur enim eodem personae cum praedecessoribus'). That, however, does not apply to collegiate offices, for no single member of the chapter succeeds to the previous one to the point of being identified with him: the identification happens only through the office, and no single member of the chapter represents the office ('sed in canonicis secus. Nam canonici qui substituuntur, canonicis non succedunt in honore et onere, sed capitulum eis succedit'). Innocent IV, *ad* X.1.6.28, § *Propter bonum pacis* (*ibid*., *fol.* 58*vb*, n. 5). See further *ibid., fol.* 59*rb-va*, n. 8-9.

of transfer of obligation, but in terms of agency. The immortality of the phoenix is immortal, precisely in the same way as the *dignitas* of the Crown.
Baldus' concept of agency in (what we might anachronistically consider as) public law is best explained through the example of the king as agent of the Crown. To better appreciate the legal implications of that concept, however, the focus of our analysis should be more on the obligations of the office than on the abstract relationship between office and person. Doing so might give useful insights as to the 'mechanism' of representation and, especially, its limits.

A classical text of Baldus on the immortality of the *dignitas* is his *consilium* on whether the obligation undertaken by the old king should bind his successor. Baldus answers drawing a distinction between obligations undertaken by the king as a person and obligations assumed in the name of the Crown.[28] The same happens with the papacy, the 'supreme dignity' (*dignitas suprema*).[29] The pope may die, says Baldus, but the papacy does not. In both cases the question is therefore which obligations incurred by the previous prince or pope are transferred to the new one.[30] In this regard, the person of the king or pope is just the agent representing the immortal *dignitas* of the Crown or the papacy. The death of the incumbent in effect amounts just to the replacement of one agent with the next. Therefore, if the obligation was assumed by the office, the mere change in the person of the agent may not extinguish it. In law, there is no change in the person of the obligee: it was always the office.[31]
The *dignitas* does not suffer. Baldus famously said as much contrasting the emperor Constantine, allegedly healed from leprosy by pope Sylvester I, with his imperial '*dignitas*, which does not die nor suffer'.[32] The *dignitas* does not suffer, but neither can it will: volition pertains only to the physical person representing it.[33] If the *dignitas* can only will through the person of its agent, it also needs the same person to

[28] Baldus, cons.3.159 (*Consiliorvm sive Responsorvm Baldi Vbaldi Pervsini ...*, Volumen Primum-Quintum, Venetiis, apud Dominicum Nicolinum, et Socios, Venetiis, 1580, *fols.* 45*rb*-46*va*). See for all Canning, *The Political Thought of Baldus de Ubaldis* (note 21), pp. 86-90.
[29] Baldus, *ad* Dig.1.9.4, § *Qui indignus* (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 50*va*, n. 2).
[30] Baldus, cons.3.159 (*Consiliorvm sive Responsorvm* (note 28), *fol.* 45*va*, n. 3): 'imperator in persona mori potest: sed ipsa dignitas, seu imperium immortalis est, sicut et summus Pontifex moritur, sed summus Pontificatus non moritur, et ideo quae procedunt a persona, et noua fede, personalia sunt, si a successiua uoluntate dependent. Si autem statim transferunt secum in plenum tunc mors collatoris non impedit beneficium, quin duret tempore successorio.'
[31] *Ibid., fol.* 45*vb*, n. 4-5: 'in contractib(us) Regum est expressum, quod contractus transeunt ad successores in regno, si celebrati sunt nomine dignitatis, extra, de re iud(icata) c. abbate in prin(cipio) lib. 6 (VI.2.14.3), et extra de iureiur(ando) c. intellecto per Inn(ocentium) [cf. Innocent IV, *ad* X.2.24.33, § *Intellecto* (*Commentaria Innocentii Quarti* (note 27), *fol.* 289*va*)], nec mirum, quia in regno considerari debet dignitas, quae non moritur ... unde cum intellectu loquendo, non est mortua hic persona concedens, s(cilicet) ipsa reipublica regni, nam uerum est dicere, quod respublica nihil per se agit, tamen qui regit rempublicam, agit in uirtute reipublicae, et dignitatis sibi collatae ab ipsa republica. Porro duo concurrunt ut in Rege: persona, et significatio. Et ipsa significatio, quae est quoddam intellectuale, semper est perseuerans enigmatice, licet non corporaliter: nam licet Rex deficiat, quod ad rumbum, nempe loco duarum personarum Rex fungit, ut ff. de his, quib(us) ut indi(gnis) l. tutorum (Dig.34.9.22), et persona Regis est organum, et instrumentum illius personae intellectualis, et publicae.'
[32] Baldus, *proemium* ad Digestum Vetus (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 3*ra*, n. 38): 'dignitas qua non moritur, nec patitur'.
[33] Baldus*, ad* Dig. 1 Const. *Omnem*, § 7 (*Haec autem tria*), *ibid., fol.* 5*vb*, n. 6: 'volunctas proprie attribuitur personae: sed improprie attribuitur dignitati. Et ideo si verba in dignitate non sonant, in dubio praesumuntur sonare in personam.'

act. Alone, the *dignitas* may not act.[34] The point might seem obvious, but it is important because the opposite is not true: the person can act not as representative of the office but as individual. The problem, as Baldus has it, is that in both cases the person is always the *causa immediata* of an act. Hence the need to distinguish between the cases where the office is the *causa remota* of the same act and where there is no relationship between act and office. This is why the most important remarks of Baldus on the difference between person and office are to be found on issues about succession - first of all, to the throne. Because the most efficient way to separate person from office is to remove the physical person from the picture, so as to clarify which obligations and rights should pass on to the next person representing the same office.[35]

Perhaps Baldus' most quoted text on the immortality of the Crown is that - revealingly enough - dealing with succession to the throne: 'the *dignitas* does not die', so the new prince simply replaces the old one. Matter of fact, in that text Baldus dealt with a slightly different and more technical issue. He was commenting on the second of the two books of the Digest devoted to legacies (Dig.31). This book contained two texts, listed one after the other, usually commented together by medieval jurists (Dig.31(.1).56-7).[36] The first text provided that, when the testator left a bequest to the emperor but the prince predeceased him, then the bequest would go to the next emperor.[37] The second text dealt with the bequest to the Augusta (the emperor's wife) and stated the opposite: if the testator bequeathed something to the Augusta but she died before the testator, then the bequest would be void.[38] The Gloss sought to explain the difference without any reference to representation. The Augusta does not enjoy all Caesar's prerogatives, so for instance she cannot legislate.[39] Commenting on the same text, Bartolus went a step beyond: a legacy to the incumbent in office can go to the

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[34] Baldus, *repetitio ad* Dig.4.4.38.1, § *Item quod dicitur, ibid., fol.* 246*rb*, n. 45: 'ecclesia sine Papa nihil agit: ideo oportet quod per alium regatur, sicut et regitur minor.'

[35] See esp. Baldus, cons.3.121 (*Consiliorvm sive Responsorvm* (note 28), *fol.* 34*ra*, n. 6): 'quaedam sunt, quae competunt personae in dignitate, ita quod persona sit causa immediate: dignitas autem sit causa remota. Quaedam uero sunt, quae competunt dignitati principaliter, et quia dignitas informat suum subiectum competunt personae: quia dignitas sine persona nihil agit, in primis extincta persona, quae erat finale subiectum actus: expirat ipse actus pendens, quia persona facit locum actui ... Et ideo quaecunque sunt singularis fidei, et industriae, tanquam singulares animi passiones morte annihilantur et non transmittuntur, vnde fidem, et industriam nemo transmittit. In secundis autem, quae competunt dignitati per prius, et personae in dignitate positae per posterius, et per sic necesse esse, quia (ut dixi) iurisdictio sine persona nil agit, ut ff. de origi(ne) iur(is) l. 2 § post originem iuris (Dig.1.2.2.13). Ibi attendimus dignitatem tanquam principalem: et personam tanquam instrumentalem. Vnde fundamentum actus est ipsa dignitas, quae est perpetua, extra de offic(io iudicis) deleg(ati) c. quoniam abbas (X.1.29.14). Cf. *ibid*., cons.3.217, *fol.* 63*va*, n. 3: 'Cum persona sit assumpta loco finalis causae prorograndi ab alio non futuro, personalis, quae est alia in substantia hominis, et non persona idealis, quae est dignitas, ipsa facit locum prorogationi, et non dignitas, igitur extincta persona extinguitur prorogatio.'

[36] E.g. Gloss *ad* Dig.31(.1).56, *casus ad* § *Quod principi* (*Pandectarvm Ivris Civilis* (note 16), vol. 2, col. 901): 'Legaui imperatori, et ipse decessit ante diem legati cedentem, id est ante mortem meam: certe ad sequentem imperatorem transmittur. Secus autem esset in Augusta, cui legatum esset et h(oc) d(icit) l(ex) seq(uens) (i.e. Dig.31(.1).57). Vivianus (Tuscus).'

[37] Dig.31(.1).56 (Gaius, 14 Iul. et Pap.): 'Quod principi relictum est, qui ante, quam dies legati cedat, ab hominibus ereptus est, ex constitutione divi Antonini successori eius debetur.'

[38] Dig.31(.1).57 (Mauricius, 2 Iul. et Pap.): 'Si Augustae legaveris et ea inter homines esse desierit, deficit quod ei relictum est, sicuti divus Hadrianus in Plotinae et proxime imperator Antoninus in Faustinae Augustae persona constituit, cum ea ante inter homines esse desiit, quam testator decederet.'

[39] Gloss *ad* Dig.31(.1).56, § *Si augustae* (*Pandectarvm Ivris Civilis* (note 16), vol. 2, col. 901): '... tu dic eadem priuilegia, sed non omnia: nam nec legis condendae.'

successor if there is a direct link between person and office (as with Caesar), but not also when the link is only indirect (as with Caesar's wife).[40] So for instance when a bequest is left to the bishop not as a specific person but as incumbent in office, Bartolus observed, then it would pass on to his successor. But the same could not apply to his vicar, since he is not the agent of the office but rather the agent's agent (that is, the agent of the representative of the bishopric).[41]

In his turn, Baldus went a step beyond Bartolus. This new step, however, was a very significant one. The difference between Caesar and his wife is that the *dignitas* - in the sense of office - is only that of the prince. The wife of the incumbent has a *dignitas* only by association. Since the *dignitas* of the office does not die, the legacy to Caesar is always valid. As the recipient of the bequest is to be determined by reference to the office, which is immortal, it should go to the incumbent in office. By contrast, the Augusta has a *dignitas* only in the sense of social (and so, moral) standing, not also in the sense of legal representation (and so, of office). She is Augusta simply by association with the person of the incumbent on the throne. When she dies, therefore, her (personal) dignity dies too. 'Such a *dignitas* dies with the person', and a new one is created by association with the immortal office of the Crown: 'with a new Augusta, a new *dignitas* is created'.[42] Thereafter Baldus recalls Bartolus' example of the legacy to the bishop and to his vicar, and applies the same rationale. Both the office of Caesar and that of the bishop, says Baldus, are immortal and always the same. Since the office of bishop does not die, the legacy can pass on to the next incumbent. By contrast, he continues, the position of the vicar is closer to that of the Augusta: just as a woman becomes Augusta when she marries the representative of the Crown, so a man becomes episcopal vicar when appointed by the actual representative of the bishopric.[43]

This difference between person and agent may be clearly seen also in Baldus' comment on another text, this time of the Code (Cod.7.61.2). The text provided that provincial governors should refer criminal cases to the emperor only after having notified the parties. Commenting on this text, Baldus wondered what would happen if, having been consulted, the prince were to die before he could reply. Should the governor start the procedure anew or could the next prince just reply to the petition

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[40] Bartolus, *ad* Dig.31(.1).56, § *Quod Principi* (*In Secundam Partem Infortiati Bartoli a Saxoferrato Commentaria* ... Basileae, ex officina Episcopiana, 1588, p. 105, n. 1): 'Relictum sub nomine dignitatis, transit ad successorem in dignitate, si dignitate, quis habet per se: secus si per consequentiam alterius.'

[41] *Ibid.,* n.3: 'Et sic facit ista lex, quod si relinquitur episcopo sub nomine dignitatis, transit ad successorem: secus si relinqueretur uicario: quia tunc non transit in sequentem uicarium.'

[42] Baldus*, ad* Dig.31(.1).56, § *Quod Principi* (*Baldi Vbaldi ... In Primam et Secvn*[*dam*] *infortiati partem, Commentaria* ... Venetiis [apud Iuntas], 1577, *fol.* 151*vb*): 'Relictum dignitati, qua quis habet per se, non potest effici caducum, quia dignitas non moritur: secus si relinquatur dignitati, quam quis habet per alium, quia talis dignitas moritur cum persona, et facit hoc ad rationem quam assignat tex(um) extra, de praeben(dis) c. dilecto (X.3.5.25), et no(tandum) quod in l. quod Princi(pi) (31(.1).56) dignitas vacat, et l. si Augusta (Dig.31(.1).57), dignitas desinit. In tex(tu) constitutiones tamen, non continet haec constitutio ius singulare, sed commune, quia Imperium, et dignitas semper est et non moritur; et facit quod no(tandum) s(upra) de pac(tis) l. tale pactum, in fi(ne) (Dig.2.14.40.3). In l. si Augusta (Dig.31(.1).57), Augusta non habet dignitatem ex se, sed per modum cuiusdam dependentiae, i(d est) accessionis, et ideo in tali dignitate non habet successorem, vnde sua dignitas eius morte finitur, et cum noua Augusta noua dignitas creatur.'

[43] *Ibid.*: 'et ideo dicit Bar(tolus) quod si relinquitur Episcopo, et Episcopus moritur, viuo testatore, quod debetur successori; secus, si relinquitur Vicario, et Vicarius moritur viuo testatore, quia Vicarius de nouo creatus non habebit istud legatum secundum Bar(tolum). Item no(tandum) in l. quod Principi (31(.1).56), quod legatum quod immortali relinquitur non potest effici caducum, vel quasi: vnde quando relinquitur pauperibus in genere, quia genus non potest perire, istud legatum non potest effici caducum.'

addressed to his predecessor? The petition was addressed to the Crown in the person of his representative, reasons Baldus, so it was not directed to the prince as a private individual. The governor therefore awaits a reply from the Crown and not from the person wearing it. Hence Baldus' conclusion is that the new prince may well reply to the petition addressed to (the Crown in) the person of his predecessor. This text of the Code - especially in its medieval interpretation - referred to the decisions rendered by the emperor in his quality of highest judge. Clearly the decision of this supreme judge did not depend on the personal qualities of the physical king, but from the position of his office, at the apex of the hierarchical jurisdictional structure. This strengthens Baldus' reasoning: the petition is clearly addressed to the Crown, he says, because in its decision it is 'impressed' the *dignitas* of the crown itself (*illa dignitas imprimit in actu quam gerit*).[44]

Having clarified the rule, Baldus applies it to more complex cases. If the prior of the Dominicans was appointed as executor by the testator, but he died before being able to carry out the task, should the next prior do that? The Dominican prior, reasons Baldus, was appointed because of the *dignitas* of his office, 'as a person made perfect in Christ'. The *dignitas* of that position attests to the moral worthiness of its incumbent. So the choice did not depend on any specific quality of the individual person, but rather by the qualities needed to hold that office. Once again, the *dignitas* of the office attests to the *dignitas* of its holder. The appointment as executor may therefore pass on to the next prior. It would be different, adds Baldus, if the incumbent in office were to be appointed as *arbiter*. Here, he explains, the choice depends on considerations of personal nature. So even if the person appointed as *arbiter* were to hold an office, that would not add anything to the verdict: 'the *dignitas* would not bestow anything to the deed'.[45] Commenting on the Institutes Baldus expands on the point. Normally, the next incumbent in office may hear a dispute entrusted to his predecessor. That, however, does not apply to most arbitrations. Typically, explains Baldus relying on Innocent IV, the choice of the *arbiter* does not depend on the office he might represent (the appointment is not made *sub nomine dignitatis*), but on the qualities that one possesses as individual (it is made *sub nomine proprio*). So the arbitration does not pass on to the successor in office, for the appointment was made 'with regard to the person, not because of the office' (*contemplatione personae, non causa dignitatis*). By the same token, however, the opposite conclusion applies when the *arbiter* was chosen because of his office, not as a specific person. It is also possible to think of the opposite scenario: the testator would usually chose his executor 'with regard to his person' (*contemplatione personae*), not to any office he might hold. But if the appointment were to be made by

[44] Baldus*, ad* Cod.7.61.2, § *Super delictis* (*Baldi de Pervsio Ivrisconsvlti clarissimi, svper VII, VIII et Nono Codicis, commentaria luculentissima ...* Lvdgvni, typis Gaspar & Melchior Trechsel, 1539*, fol.* 99*rb*, n. 3): 'Quero si preses consuluit principem et princeps moritur an debeat expectari responsum successoris. Respondeo quia consultatio concernit principaliter dignitatem que non moritur vt l. quod principi, de leg(atis) ii (Dig.31.(1).56) licet persona sit organum ipsius dignitatis sine quo dignitas nil facit. ... aut tanquam dignitas non expirat aut tanquam persona in dignitate: et tunc illa dignitas imprimit in actu quam gerit aut demostrat cum quo geratur. Primo casu commissio est realis, secundo est personalis: quia prima persona est immediata causa commissionis'.

[45] *Ibid.*: 'Respon(deo) aut fides sumitur ratione officii vt quando testator reliquit executorem priorem predicatorum et transit ad successorem: ei enim committitur tanquam persone perfecte in Christo ... aut dignitas actu nihil confert: et tunc expirat vt in compromissa: quia compromittere est quod personale.'

reference to a specific office, continues Baldus, then the appointment would pass on to the next incumbent.[46]

In the course of these pages, we will see how much did Baldus rely on canon lawyers. Together with Innocent IV, the canonist most quoted by Baldus is probably Johannes Andreae.[47] In his comment on the title of the *Liber Extra* on canonical elections and the powers of the elected (X.1.6), Johannes Andreae wondered whether the oath to a plelate would be still binding even after his deposition from office. The answer of Johannes Andreae depended on whether the oath was made to the prelate as representative of the office or as a private person. Only in the second case, he concluded, one would be still bound by the oath.[48] Building on Johannes Andreae's comment, Baldus wonders what would happen in the opposite case - when it is the

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[46] Baldus, *ad* Inst.2.16.7, § *Substituitur* (*Praelectiones in quatuor Institutionum libros* (note 11), *fol.* 26*rb-va*, n. 2-5): '... quando est delegata aliqua causa alicui sub nomine dignitatis, quod illo defuncto succedat in delegatis successor, vt in c. quoniam Abbas, extra, de offic(cio) deleg(ati) (X.1.29.14) et l. et quia ff. de iur(isdictione) om(nium) iudi(cium) (Dig.2.1.6). Sed pone quod compromissa est causa in aliquem sub nomine dignitatis, et mortuus est, certum est quod si fuisset compromissa sub nomine proprio non transiret compromissum ad successorem in dignitate: quia compromissum arbitri morte finitur: vt l. diem proferre ff. de (receptis qui) arbi(trium) (Dig.4.8.27pr). Sed nunquid hoc casu transibit [compromissum] ad successorem? Videtur quod sic quemadmodum dicimus in legato ar(gumentum) dictorum iurium. Innocen(tius) in c. fin. extra de offic(io) delega(ti) [cf. Innocent IV, *ad* X.1.29.43, § *Eligere*, *infra* in this note] determinat contrarium notabiliter: nam in compromisso non transit aliquod vniuersale, sed vnus actus tantum; secus est in iurisdictione vbi quid vniuersale transit secundum eum. Pro hoc facit quod dixi super ista glo(sam) nam quotiescunque proferuntur verba generalia contemplatione affectionis non continetur successor in effectu, sed in proposito licet verbis generalibus appellatiuis causa sit compromissa hoc factum est contemplatione personae, non causa dignitatis, et ideo nullatenus transit ad successorem in dignitate secundum dictam declarationem dicti Innoc(entii) quae est vera. ... In quaestione proposita nomina dignitatis non introduxit testator, seu compromittens, ideo nil facit quod hic dicitur ad q(uaestiones) illas. Possumus tamen respondere quod ratio quare admittatur successor in dignitate est, quia executor quem dat testator succedit loco legitimi executoris, videlicet Episcopi, qui est legitimus executor: vt l. nulli et l. si quis ad declinandam C. de Episco(pis) et cle(ricis) (Cod.1.3.28 and 48(49)) quasi sub nomine dignitatis sit executor vnde succedens loco eius ipsius naturam sapit'.
Baldus' entire reasoning (a rather lengthy one - this note reproduces only the most salient parts of it) relies heavily on Innocent's position on the same matter. The successor of the incumbent in office, the pope maintained, takes his place as executor so long as the testator's choice was not on the person as individual but as representative of the office. An obvious corollary, continued Innocent, is the need to look at the exact words of the appointment, so as to better understand the testator's true intention. Even that, however, might not suffice. So Innocent added another and more general condition: the appointment can pass to the next incumbent in office if it does not require specific, personal qualities. So for instance jurisdictional tasks do not depend on personal qualities, but on the jurisdiction that derives from the office itself. By contrast, he concluded, the ministry of preaching requires knowledge: an illiterate man cannot preach a sermon. Innocent IV, *ad* X.1.29.43, § *Eligere* (*Commentaria Innocentii Quarti* (note 27), *fol.* 144*va*, n. 3): 'Sed quaero si successor, quando est scriptum, non expresso nomine personae, sed dignitatis tantum, vel loci hoc possit perficere, argu(mentum) quod sic, supr(a) eo (titulo) quoniam abbas (X.1.29.14). Quidam respondent ad hoc, vt sciatur, quae transeant ad successorem inspiciendam esse conceptionem verborum, in quibus forte designabit se certam personam ad hoc tantum eligere, vel etiam designabitur, quod ad successorem transeat et inspicienda est inde facti natura primo, vel potius ministerijs, puta vtrum ministerium delegari possit communiter, et per alios implorari, vel non, nam si non possit communiter per alios implorari sine vlla iurisdictione, vt est ministerium recipiendi testes excommunicandi, vel absoluendi, transit ad successorem ... Si vero tale sit ministerium, quod communiter ab alijs non impleatur, sicut est praedicare crucem, vbi exigitur persona literata, et quae praedicet opere et sermone, et idem in ministerio iniungendi poenitentiam.'

[47] Cf. M. Bertram, *Kanonisten und ihre Texte (1234 bis Mitte 14. Jh.),* Leiden 2012, p. 451, note 66.

[48] Johannes Andreae, *ad* X.1.6.34, § *Iuramentum huiusmodi* (*Ioannis Andreae ... In primum Decretalium librum Nouella Commentaria* ..., Venetiis, Apud Haeredem Hieronymi Scoti, 1612, *fol.* 108*vb*, n. 38).

prelate to swear an oath. If the prelate swears an oath to pay something in the name of his office and then he is deposed from it, is he still bound by his oath? To answer the question Baldus applies the same logic as Johannes Andreae: if the oath was tendered 'not as himself in his own person, but as someone else in the person of the church', then the prelate is no longer bound by his oath. To argue as much, Baldus recalls the prohibition to enforce a judgment against the guardian (*curator*) of the insane after the death of the insane person (Dig.26.9.5pr). Just as the ex-guardian, reasons Baldus, the prelate is no longer bound because he has ceased to represent the office for which he previously swore the oath. The solution of course would be the opposite, he continues, if the prelate incurred in the debt not 'for the utility or necessity of the church, but for his own business'.[49] What is particularly interesting in Baldus' reasoning is the description of how the obligation for the office is undertaken by the agent. When the prelate tenders his oath for the church, says Baldus, it is not the person of the prelate to do so: the prelate acts 'as someone else' (*tamquam alius*). This explains the relationship with the case of the ex-guardian. After the death of the insane, the guardianship is extinguished, so it is not possible to enforce a judgment against the guardian. The guardian, reasons Baldus, exists no longer. What is left is only the individual who used to exercise that role. And so this individual is liable only for his own obligations.

2.3. Collegiate bodies and possessory issues.

The relationship between king and Crown is ultimately the same as that between church and prelate: 'the church may do nothing without the prelate, nor the prelate can do anything without the church'.[50] Instead of the metaphors of the phoenix and the wardship, here Baldus opts for the ecclesiological concept of mystical body. The prelate, becoming one thing with the church, is the 'true soul' (*vera anima*) directing the 'true body' (*verum corpus*) of the church.[51] Despite the ecclesiological context, also this metaphor serves a practical and legally-minded purpose - explaining the concept of agency. Between Crown and church, however, there is an important difference: many ecclesiastical dignities are not individual offices. Proper representation occurs only when the office is represented by a single person. The bishop is a typical example: whenever the bishop exercises his jurisdictional powers, he does so not as an individual person, but as the representative of the episcopal *dignitas*.[52] Looking at the bishop as the representative of the individual office is

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[49] Baldus, *ad* X.1.6.34, § *Venerabilem* (*Baldvs svper Decretalibvs* (note 26), *fol.* 65*vb*, n. 14): 'Quero prelatus nomine prelature iurauit aliquid soluere debere tandem vitio suo depositus est ab officio, vel renuntiauit in manibus superioris, vtrum sit liberatus a vinculo iuramenti, dicit Io(hannis) an(dreae) quod sic, quia non iurauit tanquam ipse in propria persona, sed tanquam alius in persona ecclesie (cf. *supra,* note 48), ff. quando ex facto tutorum, <l.> vel post mortem (Dig.26.9.5), quod verum est si debitum erat contractum pro vtilitate vel necessitate ecclesie secus si pro negotiis proprijs.'

[50] Baldus, *ad* X.2.13.5, § *Item cum quis* (*ibid., fol.* 150*ra*, n. 5): 'Ultimo no(tatur) quod ecclesia sine prelato nihil agit nec prelatus sine ecclesia sicut tutor onerarius non habens administrationem, vt ff. de sol(utionibus) l. quod si forte § i (Dig.46.3.14.1)'.

[51] *Ibid.*: 'Et his apparet quod ecclesia et prelatus sunt vnum corpus misticum sicut verum corpus et vera anima ipsius sunt vnum quid naturale.' Cf. Meder, *Doppelte Körper im Recht* (note 24), pp. 44-46.

[52] Baldus, *ad* Cod.3.34.2, § *Si aquam* (*Baldi de Pervsio ... svper Primo, Secvndo & Tertio Codicis commentaria luculentissima ...* Lvdgvni [typis Gaspar & Melchior Trechsel], 1539*, fol.* 217*vb*, n. 53): 'Sed pone quod episcopus vtatur iurisdictioni episcopali: quero an dicatur in episcopali possesione sine ecclesia uel persona. Dicit Inno(centius) quod ecclesia, quia is possidet cuius nomine possidetur, vt no(tat) Inno(centius) de reli(giosis) do(mibus) c. cum dilectus (X.3.36.8) [cf. *infra*, note 121]. Intellige quod non possidet persona, s(cilicet) nomine suo proposita; sed si nomine appellatiuo possidet, bene possidet.'

particularly useful because of the contrast with the cathedral chapter (*capitulum*) that elects him. While the episcopal *dignitas* is an individual office, the cathedral chapter is a collegiate body. This means that no single individual within it can alone be considered as its legal representative. Volition, we have seen, does not pertain to the office but to its physical representative.[53] When this representative consists of a plurality of individuals, however, the link between the will of such individuals and that of the office is only indirect. The will of any single individual does not translate directly in the volition of the office.

The difference in the formation of the will of individual and collegiate offices was amply discussed by Innocent IV, who often referred to the cathedral chapter so as to highlight the contrast with the bishop.[54] Baldus elaborates on the subject especially on issues of possession of incorporeals. Since it is not possible to take possession of what lacks a corporeal dimension, the usual way to lose a servitude in Roman law was just not using it. Some servitudes, the negative servitudes, were however not meant to be used. A negative servitude was lost through passive acceptance of a behaviour incompatible with the servitude itself. Letting the neighbour build up without doing anything for a sufficient length of time, for instance, results in the loss of the right of view. Could the right of election be lost in the same way? Barring servitudes, a right is not lost by simple non use. But, on a practical level, the possession of that right might. Therefore, asks Baldus, when an appointment is made by someone who has no right to do so, does the inertia of the person who has that right lead to the loss of the possession of the right? The answer, explains Baldus after Innocent IV,[55] depends on the nature of the office. If the person who does not oppose the usurpation of the right is the representative of an individual office, then his inertia would lead to the office losing possession of that right. If on the contrary the same person does not represent the office by himself, but is just one of several individuals contributing to the formation of the office's will (and so, if the office is a collegiate one, such as the chapter), then the office does not lose possession. The reason, explains Baldus, is that in a collegiate office those who make the election act 'as a chapter' (*ut capitulum*), not 'as single individuals' (*ut singuli*). The collegiate nature of the office, in other words, does not allow to ascribe the inertia of any single individual to the office itself.[56] Later on, in his comment on the *Liber Extra* (significantly enough, written during the Great

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[53] *Supra*, § 2.2, text and note 33.

[54] E.g. Innocent IV, *ad* X.1.4.8, § *Suspensus* (*Commentaria Innocentii Quarti* (note 27), *fol*. 34*rb*, n. 5).

[55] Innocent IV, *ad* X.1.6.24, § *Qvaerelam* (*ibid*., *fol.* 54*vb*, n. 3): 'Et not(atur) quod licet per vnum annum, vel plures ego omiserim ex causa petere debitam pensionem, vel si vna vice omisi interesse electioni, non propter hoc amitto possessionem, quae sine animo non amittitur, sed quando petam pensionem, si denegetur, tunc amitto possessionem, argu(mentum) C. de ser(vitutibus) et aqua l. fin(alis) (Cod.3.34.14) et tunc possum vti interdicto recuperandae possessionis ... Et hoc verum est, quando sum in possessione interessendi electioni, sed secus esset si essem in possessione, quod solus eligerem, quia tunc si alius eligat, et pro electo habeatur a subditis bene amitto possessionem, quia non videor habere animum retinendi possessionem, cum electum ab alio patiar vti dignitate sua, *sed cum debeo interesse electioni electio, non fit nomine cuiuslibet canonici singulariter, sed nomine capituli*, et ideo non priuatur possessione ille qui condemnit et qui non interest, quia capitulum quod est in possessione eligendi, non priuatur possessione eligendi, nec etiam ille, qui non interest, *quia ille non suo nomine hoc ius possidebat, sed capituli*' (emphasis added).

[56] Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fol.* 117*rb*, n. 42): 'Queritur an negligens perdiderit possessionem. Sol(utio), secundum Innoc(entium) aut electio erat penes capitulum aut penes istum negligentem tanquam penes singularem personam. Primo casu aut eodem iure spectabat electio ad omnes, et tunc non perditur possessio. Et ratio est ista: quia ille potest perdere possessionem qui eam haberet; sed iste non habet possessionem, sed capitulum: ergo eam perdere non potest. Capitulum vero eam retinet: quia eligentes eligent vt capitulum, non vt singuli.'

Schism)[57] Baldus applies the same reasoning to the cardinals' possession of the right to elect the pope. That right does not pertain to any single cardinal: they hold it for the universal Church. So, Baldus concludes, even if they were to lose possession of that right, the Church would still retain it.[58]
The same rationale can be applied to less dramatic but still legally relevant possessory issues. In order to recover possession of his office, wonders Baldus, should the prelate act in his own name or in the name of the office he still represents, but no longer possesses? Building again on Innocent IV, Baldus argues that the prelate might well act in either capacity - as a private individual or as the lawful representative of the office. The difference is only procedural. Acting as individual would be easier, for the prelate should only prove the dispossession. Acting as the representative of the office, while possible, would be more complex, since the prelate should prove his right to represent the office first.[59]

2.4. Agent versus Office

The most original contribution of Baldus to the canonists' approach (especially of Innocent IV) on agency in a (proto-)public law dimension is to be found not on collegiate offices but on individual ones: the inner limits of the validity of the agent's commands. This is also why the present contribution started with the description of *officium* in terms of *dignitas*: as we have seen, the double meaning of *dignitas* - moral and legal - applies both to the person holding the office and to the office itself. The office at the same time is a *dignitas* and has a *dignitas*: it is both a subject different from that of its representative, and it embodies certain moral values. So for instance the *dignitas* of the papacy is supreme not just because placed at the apex of the jurisdictional pyramid of the whole Church, but also because it embodies the Christian values in their higest degree. This supreme moral worthiness in turn justifies

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[57] Baldus wrote his commentary on the *Liber Extra* (rather, on half of it - the first two books and the beginning of the third) in the last decade of the fourteenth century: see esp. V. Colli, *Le opere di Baldo. Dal codice d'autore all'edizione a stampa*, in C. Frova, M.G. Nico Ottaviani, S. Zucchini (eds.), *VI Centenario della Morte di Bado degli Ubaldi,* Perugia 2005, pp. 25-85, at 77-79. Cf. Canning, *The Political Thought of Baldus de Ubaldis* (note 21), p. 9, note 30.

[58] Baldus, *ad* X.1.3.25, § *Olim ex literis* (*Baldvs svper Decretalibvs* (note 26), *fol.* 38*ra*, n. 21): 'sive per veros cardinales sive per falsos papa eligatur ecclesia semper retinet possessionem vt l. quesitum [*sed* l. Qui fundum] ff. quemadmodum ser(vitudes) amit(tuntur) (Dig.8.6.12), nec potest ecclesia vniuersalis desinere possidere quia non potest expelli. Ita quia in iuribus incorporalibus nemo mero iure eiicitur vt ff. de vsu(rpationibus) l. sequitur § si viam (Dig.41.3.4.26), et si expellerentur cardinales tamen quia ipsi non possident nomine suo sed nomine totius catholice ecclesie ipsa vniuersalis ecclesia non perdit possessionem eligendi.' Cf. Tierney, *Foundations of the Conciliar Theory* (note 19), p. 195; M. Wilks, *The Problem of Sovereignty in the Later Middle Ages*, Cambridge 1963, p. 511, note 5.

[59] Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fol.* 218*ra*, n. 60-62): 'Item queritur an prelatus expulsus aget interdicto recuperande possessionis vel ex canone reintegranda suo nomine an nomine dignitatis. Respondeo: restitutione possessionis prelature et iuris episcopale et generaliter et in genere petit suo nomine: sed restitutione fundi vel domus petit nomine ecclesie. Officium enim est proprium persone ipsius; res autem et possessio iterum est ecclesie non persone, vt in c. <in> literis (X.2.13.5) per Inno(centium). Iuxta hoc queritur an prelatus suo nomine habeat aliquam possessionem rerum ecclesie. Dicit Inno(centius) quod suo nomine habet naturalem sed nomine ecclesie habet naturalem et ciuilem in d. c. in literis (X.2.13.5) [cf. Innocent IV, *ad* X.2.13.5, § *Prius* (*Commentaria Innocentii Quarti* (note 27), *fol.* 228*ra-b*, n. 8)], ergo duo possident naturaliter s(cilicet) prelatus et ecclesia quod est impossibile. Item si prelatus suo nomine possidet, ergo suo nomine agit quod s(upra) ipse negasse videtur, sed respondet utroque modo potest agere, sed consultius facit agere nomine proprio: quia si ageret nomine ecclesie haberet necesse se probare canonicum vel prelatum esse nec sufficieret sibi esse in possessione ... Sed si agit nomine suo sufficit sibi probare de nuda possessione secundum Inn(ocentium). Aperte dicit ergo hic Innoc(entius) quod agenti nomine ecclesie non sufficit probare de possessione: sed debet probare de canonica installatione'.

the exercise of the highest degree of jurisdiction. The same can be said for the *dignitas* of the (imperial) Crown.
While complementing each other, the moral and legal meanings of *dignitas* are different, hence they can be separated (at least in part). The typical example in canon law is that of the insane bishop. The mentally ill bishop cannot be forced to resign from his *dignitas*, but he may be deprived of its exercise because of his incapacity.[60] Clearly the problem here is only of *dignitas* in the sense of aptitude, not also of worthiness - the bishop continues to be worthy of the episcopate, but no longer fit to exercise it. The separation between the two faces of the personal *dignitas* entails a corresponding division with regard to the office. Remaining nominally the head of the diocese, the bishop retains the *dignitas* of his office, says Baldus, but he would lose the (legal) power to act for it.[61] This way, it is possible to keep the symmetry between the *dignitas* of person and that of the office. The bishop remains morally worthy, but he is now legally unfit. So he is still worth of the *dignitas* of his office, but unable to exercise it.
We have previously seen how Baldus distinguished the obligations undertaken by the person as individual from those assumed as agent of the office. Coupling this distinction with the symmetry between *dignitas* of the person and of the office, it is possible to envisage a further degree of separation between agent and office in the thought of Baldus, which is not to be found in Innocent IV and most other canon lawyers. When the king goes against the *dignitas* of his office, says Baldus, his actions are void.
To make sense of this statement, we should think again of the image of the king as custodian of the Crown. The separation between person and office allowed the distinction between obligations of the king as a person and obligations of the Crown undertaken by the king as its representative. The full separation between agent and office also allows to think of a thornier issue: the validity of any deed made by the king against the Crown. On the point, the most important canon law source is probably Honorius III's decretal *intellecto* (X.2.24.33), quoted by Baldus when distinguishing between obligations of the person and of the Crown.[62] As it is well known, the decretal absolved the king of Hungary from his oath to keep the previous alienations of the Crown's rights.[63] According to Honorius III, the oath could be

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[60] D.7 q.1 c.14. On the point see most recently B. Parlopiano, *Propter deformitatem: Towards a Concept of Disability in Medieval Canon Law*, 4 (2015) *Canadian Journal of Disability Studies*, pp. 73-102, at 96-98, text and notes.
[61] Baldus, *ad* Dig.26.5.8.1, § *Si praetor* (*In Primam et Secvn*[*dam*] *infortiati partem* (note 42), *fol.* 29*rb*): 'Furor vel dementia superueniens non tollit dignitatem, sed administrationem sic. H(oc) d(icit) in tex(to) 'momenti': per hunc § determinatur quod si Episcopus fiat furiosus, licet remanet Episcopus, non potest conferre praebendam quasi propter furorem sit priuatus exercitio dignitatis.' Cf. Dig.26.5.8.1 (Ulp. 8 de omn. trib.): '... quamvis enim praetor vel praeses sit nec furor ei magistratum abroget, attamen datio nullius erit momenti.'
[62] *Supra*, note 31.
[63] The literature on the decretal *Intellecto* is vast, but mention should be made at least of the classical work of Riesenberg, *Inalienability of Sovereignty* (note 22), pp. 48-58 and, more in detail, 113-144 and 161-175, together with that of Post, *Studies in Medieval Legal Thought* (note 19), pp. 393-401 (where, importantly, the author refers the inalienability clause to the *dignitas* of the kingdom). For a more specific focus on the decretal studied against the background of the relationship between the Hungarian Crown and the papacy see in particular J. Sweeney, *The Problem of Inalienability in Innocent III's Correspondence with Hungary: A Contribution to the Study of the Genesis of "Intellecto"*, 37 (1975) *Medieval Studies*, pp. 235-251, and, more recently, K. Štulrajterová, *The Non-alienation Clause in the Hungarian and English Coronation Oaths: A Justified or Unjustified Papal Assumption?* 29 (2011) *Bulletin of Medieval Canon Law*, pp. 219-250, where ample literature.

disregarded because incompatible with another oath already sworn by the same king: the crowning oath, with its undertaking to preserve the rights of the Crown.[64] It is on the basis of this decretal that Baldus construes the distinction between valid and invalid commands of the king.

To that purpose, Baldus moves from natural law: the orders of the (person of the) king detracting from the *dignitas* of the Crown are void because 'against natural law' (*contra ius naturale*). It follows that the king may not order a subject to sacrifice his life for nothing, for that would go against natural self-preservation. Much on the contrary, the same command is valid when its purpose is to preserve the safety of the kingdom.[65] The reference to natural law seems to point to the progressive emergence of natural law principles as an inner constraint to the power of the ruler.[66] While this is certainly true, we should not consider that as the sole basis for Baldus' conclusion. There is something else in his argument, which risks being overshadowed by our

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[64] X.2.24.33: 'Intellecto iamdudum, quod carissimus in Christo filius noster Hungariae rex illustris alienationes quasdam fecerit in praeiudicium regni sui et contra regis honorem, nos, super hoc affectione paterna consulere cupientes, eidem regi dirigimus scripta nostra, ut alienationes praedictas, non obstante iuramento, si quod fecit de non revocandis eisdem, studeat revocare, quia, quum teneatur, et in sua coronatione iuraverit etiam, iura regni sui et honorem coronae illibata servare, illicitum profecto fuit, si praestitit de non revocandis alienationibus huiusmodi iuramentum, et propterea penitus non servandum.'

[65] Baldus, cons.3.159 (*Consiliorvm sive Responsorvm* (note 28), *fol.* 46*rb*, n. 7-8): '... dumtamen non faciat aliquid, per quod minuatur honor coronae, uel status Regni, ut extra de iureiu(rando) c. intellecto (X.2.24.33) et ex hoc sequitur, quod donatio facta Titio militi ualuit. Secundo, praemittendum est, quod praeceptum Regis est seruandum, dum tamen sit iustum, uel saltem non iniustum. Unde si Rex praeciperet subdito suo, quod interficeret seipsum, uel iret ad locum, in quo trucidaretur ab hoste, uel mitteret filium suum ad uictimam, in hoc non est parendum Regi: quia talia mandata sunt contra ius naturale. Sed si mandat alicui, quod defendat patriam, et honorem Regis, etiam si hoc non posset fieri sine periculo, parendum est Regi: quia hoc ius regni erit etc. ... Per hoc reuertor ad propositum, si Rex mandauit, quod miteret filium suum per obside, unus Christianus in manus saracenorum, uel crudelis tyranni, non ualeret mandatum: ut l. ut uim, ff. de iust(itia) et iu(re) (Dig.1.1.3) et ff. de cap(tivis) et <de> postl(iminio) reuer(tis) (*sic*), l. postliminium § filius (Dig.49.15.19.7), et totum hoc redigendum est ad arbitrium boni uiri; et per hoc apparet, utrum illi praecepto de mittendo filium in obsidem debuerit parere, uel non, ar(gumentum) ff. quod me(tus) ca(usa) l. isti quidem in fi(ne) (Dig.4.2.8.3).' While the reference to Dig.1.1.3 was fairly obvious, that to a text as specific as Dig.49.15.19.7 was probably dictated by the comment in the Gloss, which linked *patria potestas* with natural affection - and so it made easy (for a later jurist) the connection with natural law. Cf. Gloss *ad* Dig.49.15.19.7 § *Charitas* (*Pandectarvm Ivris Civilis* (note 16), vol. 3, col. 1673): 'id est patria potestas, quae fuit inducta propter affectionem liberorum iure ciuili Romanorum'.

A similar position, although less elaborate, may be found in some passages of Baldus on the *Liber Extra*, especially *ad* X.2.19.9 (*Baldvs svper Decretalibvs* (note 26), *fol.* 170*va*, n. 7): 'non tamen posset imperator donare claues imperii, sicut ille qui tenet claues portarum tenetur eas resignare successori, alias potest dici proditor vt no(tatur) C. de acq(uirenda) pos(sessione) l. fi(nalis) (Cod.7.32.12), ff. de le(gats) ii. l. cum pater § pat(er) pluribus (Dig.31(.1).77.21). Item non potest viscera imperii euiscerare: quia esset homicida sue dignitatis'. The text is translated in English by Canning, *The Political Thought of Baldus de Ubaldis* (note 21), p. 87. Somewhat surprisingly, Baldus' comment on the decretal *Intellecto* itself is not particularly useful to our purposes, apart from its opening words: 'Rex debet esse tutor regni non depopulator nec dilapidator' (Baldus, *ad* X.2.24.33, *Baldvs svper Decretalibvs* (note 26), *fol.* 214*va*, n. 1). See also cons.1.271 (*Consiliorvm sive Responsorvm* (note 28), *fol.* 81*vb*, n. 3), on the relationship between prince and fisc. Cf. Kantorowicz, *The king's two bodies* (note 24), p. 184; Riesenberg, *Inalienability of Sovereignty* (note 22), p. 18, note 31, and p. 150, note 13; Post, note 19, pp. 345 and 388, note 51; J. Wahl, *Immortality and inalienability: Baldus de Ubaldis*, 32 (1970) *Mediaeval Studies*, pp. 308-328, at 320-324; Canning, *The Political Thought of Baldus de Ubaldis* (note 21), p. 216, note 38.

[66] For the application of this concept in Baldus see e.g. K. Pennington, *The Prince and the Law. Sovereignty and Rights in the Western Legal Tradition*, Berkeley-Los Angeles-Oxford 1993, pp. 207-210.

modern tendency to highlight natural law references in the medieval legal discourse: the dialectic agent-office. The command of the agent is void because it cannot possibly be imputed to the office he represents. So it remains the simple volition of a person who, as individual, has no authority over the commonwealth. In other words, the king is the 'highest agent' (*procurator maximus*), chosen for his qualities: his higher *dignitas*, as moral worthiness, makes him especially suitable (*dignus*) to that role.[67] But he is still an agent, therefore subjected to the same legal mechanism as any other kind of agency. Just as any other agent, the king's jurisdiction derives from the right to discharge his office. When his volition cannot be imputed to the office, the command is void. After all, as Baldus puts it elsewhere, it is the king who is 'bound to his office', not the office to the king.[68]

The assessment of the validity or invalidity of the ruler's command, therefore, is not (directly) based on moral judgments, but on legal representation. The proportionality of the *dignitas* of the agent to that of its office works as a constraint to the actions of the agent. Ascribing specific features to the office means distinguishing it from the agent. The more pronounced are such features, the stronger becomes that distinction. At this point, the principle of non-contradiction comes into play: the office cannot act against itself. The the will of the agent, we have seen, is the *causa immediata* of the act. When this *causa immediata* would lead the office to act against itself, the agent's volition may not be ascribed - as *causa remota* - to the office. The office has its own *dignitas*, in both its moral and legal senses, distinguished from that of the agent. The order of the king that would detract from the *dignitas* of his office cannot therefore be ascribed to the office itself. In such a case, the king may not be said to act as representative of the royal *dignitas*, but only as a private individual.

To better explain the point, Baldus recurred again to the ward-guardian relationship: the king is the warden of the Crown. This time we might better appreciate the parallel, for it postulates the full separability between the two parties. The guardian should act in the interest of the ward, but what happens when the act of the guardian goes against the ward? Baldus gives the most extreme case (which in effect is the easiest to solve): the guardian cannot kill the ward. In the same way, the prince may not be 'the murderer of his *dignitas*' (*homicida suae dignitatis*).[69] Here again, the metaphor is a legal analogy. When the guardian is clearly acting not in the interest of the ward but against it, then he is not acting in his capacity of guardian. The same applies to ecclesiastical offices: the prelate who acts in the name of the church that he represents is not allowed to cause harm to her.[70] What is interesting is not the moral prescription but the legal sanction: acting against the church, the acts of the prelate are void. The

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[67] Baldus, cons.1.327 (*Consiliorvm sive Responsorvm* (note 28), *fol.* 101*vb*, n. 7): 'Imperator est procurator maximus, tamen non est proprietatis imperii dominus, sed potius officialis ex eius electa industria, vt ff. de curatore furiosi, l. cuius bonis (Dig.27.10.9).' The *lex Cuius bonis* explained that the heir of the *curator* should not succeed him because he might not be suitable for the role. Cf. Dig.27.10.9 (Nerat. 1 membr.): '... Nam et tunc ex integro alius curator faciendus est neque heres prioris curatoris onerandus, cum accidere possit, ut negotio vel propter sexus vel propter aetatis infirmitatem vel propter dignitatem maiorem minoremve, quam in priore curatore spectata erat, habilis non sit'. In recalling that *lex* in the present discussion, Baldus highlighs the role of the prince as *procurator* as opposed to *dominus*: he is elected to the office because he does possess the required qualities, not because he is entitled to it.

[68] Baldus, *ad* X.2.24.33, § *Intellecto* (*Baldvs svper Decretalibvs* (note 26), *fol.* 214*vb*, n. 5): 'Imperator rei sue potest dare legem quam vult et non obligatur homini sed deo et dignitati sue, que perpetua est.'

[69] *Ibid., ad* X.2.19.9, *supra,* note 65.

[70] See e.g. Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fol.* 218*va*, n. 73): '... si [praelatus] contraxerit nomine ecclesie vel dignitatis cum ius sit quesitum ecclesie non potest preiudicare ecclesie'.

interest lies in that the invalidity of the deed has nothing to do with the validity of the agency. The underlying agency relationship is valid, but the ensuing act is void.

3. Towards the external relevance of invalid agency

So far, we have looked at the cases where the agent is the true representative of the office. We have seen the difference between agent and office, and that between person acting *qua* individual and *qua* agent. We have also observed how, denying to the person the faculty of acting *qua* agent to the detriment of the *dignitas* of the office, Baldus held void the acts of the lawful agent when made against the office. We should now proceed to examine a further and last degree in the separation between person and office. What happens when the agent itself is only apparently legitimated represent the office?

3.1. Agency and toleration of the unworthy agent

As it often happens with Baldus, the starting point is, once again, the thought of Innocent IV. The pope allowed the unworthy agent who was not (or no longer) in a position to lawfully represent the office to continue exercising it validly on the basis of the concept of jurisdictional toleration. At the core of this concept, elaborated by Innocent himself, lay the difference between person *qua* individual and *qua* representative of the office. The agent could still act as representative of the office despite the personal unworthiness (the lack of *dignitas* in its ethical meaning) because of the functional identification between person and office. In other words, the focus is entirely on the office, not on the person. No matter how unworthy the person may be, his acts are valid because they are done by the office - not by the private person that represents it unworthily. Hence the idea of toleration: 'anything is tolerated because of the office that one administers', says Innocent IV.[71] Left on the margin, the person *qua* individual is neither fully approved of (for he is unworthy and so *indignus*), nor wholly rejected (lest the agency link would be severed). Toleration lies mid-way: despite the wanting condition of the (person *qua*) individual, the (person *qua*) agent can continue to represent the office validly.[72] Clearly it is possible to focus on the lawful agent and tolerate the unworthy person only so long as the unworthiness does not become manifest. The agent produces the volition of the office, but such a volition is expressed outwardly - and so, towards third parties. If the condition of the person (*qua* individual) were to be known to all those thirds, then it would no longer be possible to continue focusing only on the status of agent and ignore the quality of the individual.[73]

Innocent IV allowed tolerating the unworthy in his office, but under a condition that knew no exception: anyone elected to an office should be confirmed in it by the superior authority first. Only then - and so long as this confirmation is not withdrawn - could the agent represent the office.[74] It follows that the deposition from office does not allow tolerating the unworthy agent any longer.[75]

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[71] Innocent IV, *ad* X.5.1.24, § *Et famam* (*Commentaria Innocentii Quarti* (note 27), *fol*. 495*vb*, n. 10): '... omnia enim tolerantur propter officium, quod administrat.'

[72] The point is far more complex: a better approximation in G. Rossi, *Representation and Ostensible Authority in Medieval Learned Law*, forthcoming in *Studien zur europäischen Rechtsgeschichte*.

[73] E.g. Innocent IV, *ad* X.3.2.7, § *Operis* (*Commentaria Innocentii Quarti* (note 27), *fols*. 349*vb*-350*ra*, n. 2).

[74] *Ibid.* Cf. esp. Innocent IV, *ad* X.5.27.10, § *Irritanda* (*ibid*., *fol*. 522*rb*):

[75] Innocent IV, *ad* X.5.1.24, § *Et famam* (*ibid., fols*. 495*vb*-496*ra*, n. 10): '… nisi esset in eum lata sententia depositionis, vel spoliatus esset insignibus dignitatis, tunc enim sententia a tali praelato lata,

The requisite of confirmation of course applies to any office, and it is not just referred to the case of the unworthy and so of toleration. But with regard to toleration it acquires a special importance, because it better explains the working of the concept of toleration in terms of *dignitas*.[76] Stressing the *dignitas* of the office, it is possible to overlook the *indignitas* of that who occupies it, so long as that *indignitas* remains occult. The apparent contradiction of the *indignus* enjoying a *dignitas* in fact attests to the crucial importance of confirmation, and explains its link with the concept of toleration. The *indignus* could hold a *dignitas* and exercise the office because someone worthier (*dignor*) than him allowed as much by confirming him in that office. This way, the requirement of confirmation by the superior authority shifts the focus from the *indignitas* of the person confirmed to the superior *dignitas* of that who confirmed him. Limiting the scope of toleration only to the *indignitas* that is not manifest - and so, that remains occult - is deeply related to this shift of focus towards the higher *dignitas* of the superior authority, because only the latter is manifest. The occult *indignitas* of the individual is therefore contrasted with the manifest *dignitas* of the person who confirmed him in office. This contrast ultimately highlights the distinction between person *qua* individual and person *qua* agent. Confirmation in office provides a legal basis for this distinction and strengthens the opposition between hidden moral unworthiness and visible legal capacity. The defect in the individual is hidden, the approbation of the agent by the superior *dignitas* (i.e. his confirmation in office by that who holds a higher office) is manifest. In bestowing jurisdiction upon the agent, confirmation does not heal his hidden unworthiness as a person. This way it shifts the accent from the person to the agent. So long as the defect remains occult, the person continues to validly exercise the office, because the functional identification between person and office allows to focus exclusively on the agent of the office and not on the person of the agent. Only the notoriety of the crimes of the individual or - even more - his judicial deposition from the office may therefore separate agent from office.

Coupling the central role of confirmation by the superior authority with the shift of focus from individual to agent (and so, from the person to the office) had another consequence. For Innocent IV, the capacity to validly represent the office towards third parties (external validity of agency) would strictly depend on the right to sit in the same office (internal validity of agency). For the pope there is full symmetry between internal and external validity of agency: the office acts validly towards the thirds when (and if) the agent acts validly towards the office (i.e. so long as he can validly represent it). In general terms, this would of course appear quite obvious. But Innocent IV did not like carving out exceptions to the rules, especially when that could weaken their rationale. For him, the symmetry between internal and external validity of agency knew no exception.[77]
Innocent's insistence on the point is best appreciated if seen through the shift in the interpretation of the nature of individual offices: no longer specific powers vested in

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non tenet ff. de his qui no(tantur) infam(ia) l. secunda § igitur (*rectius*, § ignominiae, Dig.3.2.2.2) ff. de iudi(ciis) <l.> cum praetor (Dig.5.1.12pr) nec potest dici, quod toleretur, sed intrusus dicitur. Credimus tamen, quod ex quo sententia de aliquo crimine lata est contra aliquem sive criminaliter, sive civiliter agitur, quod episcopus vel praelatus suus potest eum spoliare beneficiis, quod sub eo habet, 2. q.1. <c.> multi (C.2, q.1, c.18) tamen debet eum vocare, et contra eum sententiam ferre, si invenietur, et si non inveniatur, eodem modo damnabit eum, quia notorum est crimen per sententiam'.

[76] Cf. e.g. Innocent IV, *ad* X.1.6.44, § *Administrent* (*ibid.*, *fol*. 75*ra*, n. 3).

[77] See esp. Innocent IV's elaborated comment § *Administrent* in his reading of X.1.6.44 (*ibid*., *fol*. 75*ra-b,* n. 4), and of X.2.13.5, § *In literis* (*ibid., fols*. 226*vb*-227*ra*, n. 3).

the individual person elected or appointed to an office (as it was usual), but a legal subject different from the individual called to represent it. The first way of qualifying the individual office, focusing on the individual, led to the implicit flattening of the office on the person. Hence the great difficulty (or rather, legal impossibility) of many previous canon lawyers to tolerate the unworthy in office. What Innocent IV did was precisely the opposite: flattening the person (*qua* agent) on the office. This made possible tolerating the unworthy, because the accent was no longer not on the individual but exclusively on the agent of the office. Focusing on the agent and not on the individual opened the way to new and fertile legal approaches. But it also imposed a rigorous and necessary symmetry between internal and external sides of agency.[78]

3.2. Agency and possession of the office

While building on Innocent IV, Baldus is able to avoid his strict symmetry between the two sides of agency, allowing for it external validity (on certain conditions) despite the weakness of its internal side. Innocent relied exclusively on full entitlement to an office. Baldus highlights more the concept of possession of office.

Possession is a very malleable legal concept, far more flexible than the black-and-white concept of right. Innocent was not fond of ambiguities: any 'grey area' in the law ought to be reduced to its ultimate components - either black or white. Many practical situations, however, are intrinsically ambiguous. In such cases, forcing the application of general principles would mean squeezing the facts into neat legal categories. Unlike the pope, Baldus often shows more interest in those 'grey areas'. Hence the interest in the concept of possession. To explain this difference between Innocent IV and Baldus we will proceed gradually - from small differences to more significant ones.

A first hint of this difference may be seen in Baldus' discussion of the crime committed in the exercise of the office. As we have just seen, so long as the defect of the person remains occult (i.e. no manifest), for Innocent IV this does not affect the right of the agent to represent the office. It follows that even if the agent were to use his office to commit a crime, he would still retain the right to exercise it - unless that crime becomes manifest or he is deposed with a legal decision. The Gloss of Accursius discussed the subject with regard to the church's steward (*oeconomus*) who alienated ecclesiastical land in violation of an imperial edict (Cod.1.2.14.3). Because of the particular wording of that edict, the Gloss concluded that the deposition of the steward was not *ipso iure* but required a judicial decision.[79] Recalling that case, also Baldus agrees that a specific sentence of condemnation is needed.[80] But the reason is wholly different from that of the Gloss. For Baldus the need of a legal sentence to depose the agent from office does not depend on the wording of a specific provision. Even if the law established the automatic dismissal from office for certain crimes, so long as the crime remained occult the office holder would be able to validly exercise it.

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[78] For a more in-depth analysis of the concept of jurisdictional toleration see Rossi, *Representation and Ostensible Authority in Medieval Learned Law* (note 72).

[79] Gloss *ad* Cod.1.2.14.3, § *Oeconomus* (*Pandectarvm Ivris Civilis* (note 16), vol. 4, col. 35).

[80] Baldus, *ad* Cod.1.2.14.3, § *Sane* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fols.* 23*vb*-24*ra*, n. 2): 'Non obst(ante) quod sit priuandus officio: quia quamdiu non priuatur per sententiam retinet officium et exercitium officij: quod est notandum. Conclude ex hoc quod licet quis delinquerit in officio, tamen quamdiu superior non amoueat eum valent gesta per eum. ... Quinto querit glo(ssa) in § economus [*supra,* last note] nunquid iste economus sit priuatus vel priuandus dicit glo(ssa) quod est priuandus per sententiam propter verbum priuetur. Secus si dixisset priuatus sit'.

At this point in his discussion on the *oeconomus*, Baldus recalls another case, that of the notary who lets his clerk draft the instruments using his seal - a practice expressly forbidden in Justinian's Novel 44(=Coll.4.7).[81] While both the Novel and the Accursian Gloss condemned the notary but sought to rescue the instrument, Baldus' attention lingers on the notary himself. Much unlike the Gloss, he says, since the crime is not manifest the notary may continue to discharge his office until deposed with a legal decision.[82] The conclusion is rather sensible: as the crime is not known, the automatic deposition would create chaos, for it would entail the *ipso iure* invalidity of any deed done between the commission of the crime and its eventual ascertainment (hence the problems of both Novel and Gloss on the subject). Baldus' reasoning, however, is not based on common sense but on Innocent IV's concept of toleration of the agent. Building on Innocent, however, Baldus adds something more. Even after committing a crime that calls for his removal from office, he says, the notary remains its legal representative because he is still in *quasi possessio* of the office.[83] In this case, possession of the office (the *quasi* is due to the fact that the office is incorporeal)[84] operates as a bridge between proper toleration and deposition.

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[81] While there was little doubt that the notary would forfeit his office, the Novel however allowed for the validity of the instrument because of public utility considerations. Coll.4.7.1(=Nov.44.1§4): 'Si vero praeter hoc fiat, et alter delegetur: tunc subiaceat poenae tabellio, qui auctoritatem habet a nobis dudum definitam: ipsis tamen documentis propter vtilitatem contrahentium non infirmandis.' Cf. H. Ankum, *Les tabellions romains, ancetres directs des notaires modernes*, in *Atlas du notariat: le notariat dans le monde,* Deventer 1989, pp. 5-48, at 37-39. The Gloss observed that letting such a document stand might well be acceptable in Constantinople, but surely not in Italy: a document drafted by someone else than the notary is surely void. However, continued the Gloss, the same public utility argument might well be used to argue for the validity of the instruments despite the dismissal from office of the notary who drafted them. Gloss *ad* Coll.4.7.1(=Nov.44.1§4), § *documentis* (*Pandectarvm Ivris Civilis* (note 16), vol. 5, col. 225): 'hic est argumentum, imo lex expressa quod tabellio non potest delegare discipulum suum ad componenda instrumenta. Sed si fecerit instrumentum, non vitiatur, sed tabellio poenam patitur. Sed certe hoc est in Constantinopolitana ciuitate tantum. Quid autem de aliis? ... Item not(andum) hic aliud opimum ar(gumentum) quod vbicunque tabellio perdit officium suum ... quod non ideo debent vitiari sua instrumenta. Et facit ff. de offic(io) praet(orum) l. Barbarius (Dig.1.14.3). Et hoc est verum: arg(umentum) contra(rium) tamen est C. de sen(tentia) pas(sis) l. fina. (Cod.9.51.13).'

[82] Baldus, *ad* Cod.1.2.14.3, § *Sane* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fol.* 24*ra*, n. 2): 'Adde tamen quod vbi non requiritur sententia dispositiua: si tamen factum reuocatur in dubium requiritur sententia declaratoria ... facit quod not(atum) in aut(hentica) de tabel(lionibus) § penul. (coll.4.7.1=Nov.44.1§4), vbi dicit gl(ossa) quod si tabellio per sententiam legis est priuatus officio tabellionatus, hoc tamen non est declaratum per sententiam hominis, sed est occultum. Et iste tabellio exercet officium quia est quasi in possessione officii quod valent instrumenta sua quod alibi in iure ciuili non habens.' Cf. *supra*, note 81.

[83] Baldus, *ad* Cod.1.2.14.3, § *Sane* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fol.* 24*ra*, n. 2).

[84] *Quasi possessio* was often used in relation to incorporeal things since, strictly speaking, they could not be possessed. *Iurisdictio* was among them. As Bartolus has it, 'iurisdictio est quoddam ius incorporale. In iure enim consistentia incorporalia sunt: ut ff. de rer(um) diui(sione) l. i § i (Dig.1.8.1.1) ergo vendicari non potest, cum ea vendicantur, quae possidentur' (Bartolus, *Tractatus de iurisdictione*, in *Bartoli a Saxoferrato Consilia, Quaestiones, & Tractatus* ... Basileae, ex officina Episcopiana, 1588, p. 393, n. 6). The concept of *quasi possessio* was often discussed with regard to usucapion of servitudes. Writing on servitudes (incorporeal rights *par excellence*), the same Bartolus says: 'in istis iuribus incorporalib(us) non cadit aliqua possessio, sed quasi possessio, quae dicitur patientia aduersarii: ut l. pen(ultima) ff. de serui(tutibus) (Dig.8.1.19)' (Id., *ad* Cod.3.34.1, § *Si quas*, *In Primam Partem Codicis Bartoli a Saxoferrato Commentaria* ..., Basileae, ex officina Episcopiana, 1588, p. 365, n. 5). By the same token, even the exercise of jurisdiction on the basis of a forged document of the prince confers *quasi possessio* of jurisdiction, which allows its recipient to pronounce a valid sentence - see again Bartolus, *ad* Cod.1.22.2 (*ibid.,* p. 110, n. 6). The first Civilian known to have used the concept of *quasi possessio* for jurisdiction is Pillius de Medicina. According to Pillius, the possessor could use an *actio negatoria utilis* - shaped after that for the usufruct - to retain his jurisdiction.

And here, in this grey area, Baldus' position begins to diverge from that of Innocent IV.

Another (and slightly more visible) hint comes from the case of the prelate secretly removed from office - the *occultus exhautoratus*. Innocent did not write about this case, and (perhaps for this reason) Baldus mentions it only briefly. In so doing, Baldus is in effect applying Innocent's reasoning on the occult excommunicate. Just as Innocent applied the toleration principle for the occult excommunicate,[85] so Baldus argues that the person secretly removed from office can still represent it. As with the case of the notary, the solution is a sensible one. If all the deeds made by the agent after his secret deposition were to be void, this would create a series of retroactive invalidities (or rather, postponed declarations of nullity) for any transaction directly or indirectly relying on such deeds. Again, chaos. However, while Innocent came to this solution exclusively on the basis of the perduring agency relationship, Baldus shifts the focus towards possession: the superior authority secretly deprived the person of his entitlement to represent the office, but left him in possession of it. This means, argues Baldus, that some some 'vestige' (*reliquie*) of the initial confirmation still remain.[86] We are already beyond Innocent here. The symmetry between internal and external validity of agency is still present, but it is much more tenuous: the internal validity is now hanging by a thin thread - so thin that is about to break. Baldus is arguing for the external validity of agency (the right to exercise the office validly) on the basis of a 'vestige' of its former internal validity: possession no longer backed by formal entitlement.

Celeberrimi Ivre cons(*ulti*) *ac Glosatoris vetustissimi D. Pilei Modicensis Qvaestiones avreae* [Romae, 1560], q. 102, pp. 178-179. In canon law, the principle that one may have *quasi possessio* of *iurisdictio* came with the decretal *Conquestus* of Gregory IX (X.2.2.16, cf. A. Potthast (ed.), *Regesta pontificum Romanorum*, Berlin 1874, vol. 1, p. 818, n. 9583).

[85] Innocent IV, *ad* X.5.27.10, § *Irritanda* (*Commentaria Innocentii Quarti* (note 27), *fol*. 522*rb*): 'Alii dicunt, et vt videtur melius, quod siue bonus, siue malus etiam haereticus, vel excommunicatus, dum toleratur ab ecclesia per electionem, et confirmationem, etiam si fiat a peccatoribus, etiam ab haereticis vel excommunicatis, dummodo tolerantur, bene contrahit in huiusmodi matrimonio spirituali, quousque separetur palea a granis.'

[85] Innocent IV, *ad* X.5.39.34, § *Circa temporalia* (*ibid*., *fol*. 552*ra*, n. 3): 'Item dum tolerantur in aliqua dignitate, et sint occulti, non nominatim excommunicati: satis videtur quod possint excommunicare, beneficia conferre, literas impetrare, quia haec, ipsa dignitas facere videtur, et non persona excommunicata 8. q.4. <c.> nonne (C.8, q.4, c.1)'. Cf. P. Fedele, *Il funzionario di fatto nel diritto canonico*, in *Studi in onore di Francesco Scaduto,* Firenze 1936, vol. 1, pp. 321-388, at 341-345. See also Innocent IV, *ad* X.5.7.16, § *Absolutos* and § *Manifeste* (*ibid., fol*. 507*vb*): 'Absolutos se noverint a debito fidelitatis et totius obsequii, quicunque lapsis manifeste in haeresim aliquo pacto, quacunque firmitate vallato, tenebatur adstricti. ... Secus si occulte, arg(umentum) s(upra) simo(nia) c. vlt(imo) (X.5.3.46) 11 q.3 c.3 et c. Iulianus (C.11, q.3, c.3 and c.94) ibi loquitur de apostata tolerato.'

[86] Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fol.* 219*ra*, n. 83-84): 'Nunc de octauo puncto, scilicet de obedientia et iurisdictione: an sit obediendum minus iusto prelato qui est in pacifica possessione officii sui: et an possit exercere iurisdictionem suam in rebelles et videtur quod sic: vt in d(icta) l. barbarius (Dig.1.14.3). Sed in illa l(ege) concurrebant tria, scilicet superioris summa auctoritas, error communis qui idem operatur quod veritas i(nfra) de test(amentis) l. i (Cod.6.23.1) et publica vtilitas. ... Idem si concurrerent alia duos, s(cilicet) error communis et publica vtilitas, licet cesset superioris auctoritas: ut p(atet) in occulto exautorato, vt no(tatur) in aut(hentica) de tabel(lionibus) § pe(nultimo) (coll.4.7.1=Nov.44.1§4). Sed potest dici quod in exautorato adhuc remanent reliquie quedam: vt not(atur) de aucto(ritate) tut(orum) l. si pluribus (Dig.26.8.4). Secus ergo in eo qui nunquam fuit autoritate superioris fretus seu prelatus, sed forte per falsas literas obtinuit reputari prelatus, ar(gumentum) ff. de iudi(ciis) <l.> non idcirco § cum postea (Dig.5.1.44.1), et quod not(at) Inno(centius) in c. in literis, de resti(tutione spoliatorum) [Innocent IV, *ad* X.2.13.5, *infra*, note 94].'

It is important to highlight that, for Baldus, the possession of an office after manifest deposition (i.e., typically, done with a judicial condemnation) has no legal relevance, it only amounts to 'undue' (*abusiva*) possession. Indeed, he says elsewhere, 'deposition changes the cause of possession from something into nothing'.[87] By contrast, in the present situation the occult character of the deposition seems to leave the cause of possession, at least in part (there is still a 'vestige' of that 'something'). The result is plainly ambiguous: neither full deposition nor (and unlike Innocent) full agency. To explore this ambiguity we have now to look at Baldus' commentary on the *Liber Extra*.

There, a first and very significant canon law issue discussed by Baldus is that of the agent secretly suspended from office. During the first half of the thirteenth century, canon lawyers discussed much on whether the prelate suspended from office could still administer it. Some slightly earlier jurists, such as Laurentius Hispanus and Johannes Teutonicus, were in favour of that solution. Other and slightly later ones, such as Bernardus Parmensis, were firmly opposed to it.[88] Innocent IV agreed with Parmensis.[89] In saying as much, however, Innocent carved out an exception for the case the suspension from office is not known, and the prelate is commonly believed not to be suspended. In that case, explained the pope, the deeds are valid. However, he hastened to add, this is not because of the common opinion as to the condition of the person (*qua* individual). Rather, it is because the occult condition of the individual allows to consider the agency link between agent and office as not yet severed.[90] The

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[87] Baldus, *ad* X.1.6.44, § *nichil* (*Baldvs svper Decretalibvs* (note 26), *fol.* 69*vb*, n. 10): 'Adde quod nullus habens canonicum ingressum ad titulum et possessionem est intrusus nisi sit depositus vt hereticus vel per sententiam superioris quia depositio mutat causam possessionis de aliqua in nulla, siue de canonica in abusiuam, etiam si de facto possessio continuetur'. Mere possession of office without any right to it qualifies the possessor as intruder: 'Item potest dari hec regula quod intrusus dicitur omnis qui interrogatus cur possideat non potest aliter respondere nisi quia possideo' (*ibid*., n. 7).

[88] Bernardus Parmensis, *ad* X.1.4.8, § *A suspensis* (*Decretalium domini pape Gregorij noni compilatio* ..., Basileae [Johann Froben & Amerbach], 1500): 'suspensus enim non potest eligere nec eligi ... Sed nonne iudicare et praebendas dare est iurisdictionis? vti quia i(nfra) de elec(tione) <c.> nosti (X.1.6.9), et excommunicare, i(nfra) de elec(tione) <c.> transmissam (X.1.6.15), nunquid suspensus potest huyiusmodi iurisdictionem exercere? Dicunt quidam quod episcopus suspensus potest excommunicare, et praebendas dare: et respondent illi decre(tali) quia diuiersitatem (X.3.8.5) quod ille episcopus erat ab officio suspensus et iurisdictione. Sed dicunt quod canonicus suspensus eligere non potest: quia cum sit suspensus nihil officii retinet. Secus est in praelato ... Alii dicunt et melius quod episcopus suspensus non potest excommunicare, nec interdicere, nec dare prebendas, i(nfra) de exces(sibus) prela(torum) c. vlti(mum) (X.5.31.18). ... Joh(annis) et Lauren(tius) hoc concedunt, quod suspensus ab officio tamen potest excommunicare et praebendas dare: et intelligunt illam decre(talem) quia diuersitatem (X.3.8.5) cum erat suspensus ab officio et iurisdictione. Ergo autem non credo quod suspesus ab homine possit dare praebendas: vt hic dicitur, licet Lau(rentius) et Joh(annis) concedant quod possit excommunicare et praebendas dare.'

[89] Provided of course that the suspension did not just refer to the enjoyment of the prebend associated with the office (a rather common form of punishment), but to the office itself. Innocent IV, *ad* X.1.4.8, § *Suspensus* (*Commentaria Innocentii Quarti* (note 27), *fol*. 34*rb*, n. 4): 'Quidam tamen dicunt, sed non placet, quod [suspensus] excommunicare possit, et praebendas dare, et alia facere quae sunt ex iurisdictione, non de ordine, arg(umentum) infra, de elect(tione) <c.> ex transmissa (*sic*) (X.1.6.15). Et haec inteligimus vera, nisi suspensus est ab officio et beneficio, vel officium tantum cum ratione officij competat beneficium, 81. dist. <c.> si quis sacerdotum, et c. eos (D.81, c.17-18)'.

[90] Innocent IV, *ad* X.1.4.8, § *Suspensus* (*Commentaria Innocentii Quarti* (note 27), *fol.* 34*rb*, n. 4): '... Item dicunt quidam quod licet non valeat in spiritualibus, quod facit excommunicatus vel suspensus, valet tamen in temporalibus quamdiu toleratur ex ignorantia, quia forte sunt suspensi a iure, non per sententiam, et ideo omnia eius facta tenent arg(umentum) 8. q. 3. nonne (*rectius*, C.8, q.4, c.1). Sed hoc verum non credimus in his quae ratione publici officii faciunt, argu(mentum) ff. de offi(cio) praeto(rum) l. Barbarius (Dig.1.14.3).'

office may still act validly through the person of its agent, therefore, because that person (despite being secretly suspended) is still able to represent it.
It is against this background that we should approach Baldus' position on the matter. Baldus devotes only few lines to it - few but crucial. First, he succinctly reports the different positions.[91] Then, he concludes saying something of extreme importance:[92]

> That who is occultly suspended may do anything as to the others, but not as to himself. In other words, he can grant to anyone but he cannot grant to himself

The secretly suspended from office may exercise his office validly - but only towards third parties, not himself. In stating as much, Baldus is openly severing Innocent's symmetry and begins to distinguish between internal and external validity in the agent-principal relationship.
Baldus' solution depends on the combination of two elements: first (as in Innocent), the separation between person and agent; second (and much unlike the pope), the legal relevance of the possession of the office by the secretly suspended. To understand the difference with Innocent, we have now to focus on this second element - possession.

3.3. Agency triangle

When distinguishing between obligations of the person *qua* individual and *qua* agent, as we have seen in the first part of this study, Baldus relies on practical examples involving some third party. As the examples always focus on obligations, the presence of third parties might appear a truism. Nonetheless, this truism is important. Applied to the principal-agent context, the obligation against a third party forms a triangle: agent, office and third party. Just as the dychotomy between internal and external validity of the acts, also the 'agency triangle' is a well known concept in today's agency theory. But not in Baldus' times.
This triangular situation is to be found in several cases described by Baldus, typically dealing with the succession of the incumbent in office. Some of them are centred on the obligation undertaken by the previous incumbent, others on the incumbent's appointment to a specific role (e.g. testamentary executor). In both instances the problem is ultimately the same: distinguishing between agent and person. The third party (whether a proper counterparty, as in the first group of cases, or an appointor, as in the second group) always occupies one 'angle' of this triangular relationship. To solve those cases, Baldus (just as Innocent did) moves from the 'angle' occupied by the third party. The point is important, for the way the triangle is drawn has important consequences for the outcome of the case. In some instances Baldus links this 'angle' directly to the 'angle' of the office, in others to that of the individual person who represents it. In this second case (i.e. where the third party deals with the agent first of all as an individual person), in effect, there is no triangle at all. The further qualification of this person as legal representative of the office is irrelevant. The

[91] Baldus, *ad* X.1.4.8, § *Suspensus* (*Baldvs svper Decretalibvs* (note 26), *fol.* 47*va*, n. 17): 'In gl(osa) suspensus enim queritur vtrum suspensus possit iudicare prebendas dare vel iurisdictionem aliquam exercere, quidam dicunt quod sic licet non possit eligere nec eligi; gl(osa) finaliter tenet contrarium et intelligit hoc verum in suspensis ab homine nisi sit minor suspensio i(n) partecipatione excommunicati. Alij dicunt quod ea que competunt ratione officii non potest facere qui suspensus est ab officio sed ea que competunt ratione beneficii potest facere sicut potest locare predia beneficii sui.'
[92] Baldus, *ad* X.1.4.8, § *Suspensus* (*Baldvs svper Decretalibvs* (note 26), *fol.* 47*va*, n. 17): 'Item no(tatur) quod occulte suspensus omnia potest quo ad alium licet non quo ad se, i(d est) omnibus potest conferre sed non potest sibi conferri'.

relationship is only between third party and individual person: not a triangle, but a segment. When the third party deals with that individual *qua* agent, by contrast, the legal relationship is between third party and office. Since the office can only will and act through a physical person, that relationship has to be extended to the agent as well. Hence the need of a triangular relationship. But the triangle (and so, the third 'angle' - the person of the agent) comes into play only because of the immediate relationship between third party and office (Baldus' *causa remota* of the deeds of the agent).[93] When the primary relationship is between office and third party, therefore, the person of the agent is of secondary importance. In a manner of speech, the agent is fungible. And this fungibility is what allows the succession of the new agent in the same relationship with the third party (be it a contract or an appointment) as his predecessor. In all such cases, Baldus draws the triangular relationship always moving from the third party towards the office. Only then does he link the office to the agent. The movement from the third party to the physical person representing the office is therefore always a proper triangle, for between the third and the person of the agent there is always the office.

The difference between Baldus and Innocent on the external validity of the deeds (in our triangle, the relationship between office and third party), may be appreciated looking at the issue of the payment of debts. Can the payment to the false agent release the debtor? When dealing with this issue, Innocent remarked that common mistake is not sufficient to make the payment valid: the debtor paying to the agent apparent is not released from his debt to the office. This for Innocent was a question of pure logic applied to legal relationships: the debt is owed to the office, the agent apparent does not have the power to represent the office, so the debtor would be paying to a third party.[94]
To acquire the power to represent the office it is necessary to receive confirmation in office by the superior authority. That much, for Innocent, was non-negotiable. In principle, Baldus agrees with the pope. Without the confirmation by the superior authority, the simple possession of an office cannot become legal representation. We have seen that, when referring to the 'mystical body' of the church to describe the relationship between prelate as agent (the 'soul') and church as office (the 'body'), Baldus argued that the prelate who cannot be the 'soul' of the church may not act in its name.[95] In that example the prelate was in possession of the 'body' of the church without having valid appointment. The lack of valid appointment does not allow the

[93] *Supra,* text and note 35.
[94] Innocent IV, *ad* X.1.6.44, § *Administrent* (*Commentaria Innocentii Quarti* (note 27), *fol*. 75*ra-b,* n. 4): 'Nam ubi aliquis est intrusus, in aliqua ecclesia sine authoritate superioris qualis est omnis non confirmatus, puta quia sua authoritate occupavit, vel aliorum potentum, quicquid facit non tenet, sive alienando, sive praebendas conferendo, sive agendo, sive iudicando, nec liberantur ei solventes 16. q.7 <c.> si quis de(inceps) (C.16, q.7, c.12) sicut etiam non tenerent, si a quocunque extraneo fierent, non enim debet esse melioris conditionis, quia vitiosus est.' See also, and more specifically, Innocent's commentary on X.2.13.5, § *In literis* (*ibid.*, *fols.* 226*vb*-227*ra*, n. 3): 'Sed quaero quid facient subditi debitores huiusmodi violenti possessoris? Respon(deo) non respondebunt de iuribus pertinentibus ad dignitatem, quam violenter possidet, nec potest conqueri hic violentus praelatus de eis, qui spoliauerunt eum non reddendo sibi debitam obedientiam ... quia ipsi non spoliant, cum non fuerit in possessione recipiendi huiusmodi ab eis, licet fuerit in violenta possessione dignitatis cui haec debentur ... imo nec subditi per violentiam debent malaefidei possessorem expellere de possessione ... sed denegare possunt sine violentia, tamen in ea in quorum mala possessione erat possessor, quod sic probatur, quia si sponte soluat, praestat malaefidei possessori causam peccandi. Item non liberatur subditus debitor per talem solutione, quin dignitati teneatur, cum non ei, sed dignitati sit obligatus.'
[95] *Supra*, note 51.

prelate to act in the name of the church. In such a case, says Baldus, the prelate is like a 'honorary guardian without administration'.[96] Only confirmation in office allows *de iure* representation.
So far, Baldus seems to be following in Innocent's footsteps: 'I am not surprised that sometimes those who pay are deceived - he even says - for the legislator is no friend of mistake'.[97] The problem was to what extent should the uncompromising position of Innocent be followed. Unlike the pope, Baldus is not always ready to dismiss so easily the possession of the office: ignoring the simple fact that the prelate is widely seen as being in possession of the office can be problematic - if not in theory, surely in practice. Possessing something is prima facie evidence of being entitled to it. Unchallenged possession of an office does not lead to proper representation, but it can create a semblance of agency.[98] Possession shows the underlying relationship between person and office without proving its entitlement - even less establishing it. Hence the practical problems. Let us suppose, says Baldus, that the intruder in an ecclesiastical office comes to the debtor and says: 'I am in possession and I am publicly called and treated as prelate by all others, hence you should do the same'. As a matter of principle, the debtor should ask the intruder to prove his right before paying to him what he owes to the office.[99] At the same time, however, unchallenged possession of the office would typically point to the underlying right to exercise it. In such circumstances, Baldus opines, a judge might consider the improper payment to release the debtor. To strengthen his conclusion, Baldus points to the affinity between this case and that of the ward's business transacted by the false guardian. Under certain circumstances the transaction is valid, for the praetor can ratify the deed.[100] It is important to remark that, in this example, the praetor did not simply consider the payment valid, but ratified it for equitable considerations. The 'mechanism' is the same in the case of improper payment: the validity of the payment to the false agent in possession of the office is not a legal effect of the mistake of the debtor, but it depends on the authority of the judge. The relationship between third party and office is valid, but this has no consequences as to the relationship between office and its possessor. This way, Baldus avoids the harshness of Innocent's conclusion without bestowing internal validity to abusive agency.
It may be recalled that, writing on the validity of the deeds done by the secretly deposed, Baldus considered his enduring possession of the office as a 'vestige' of the previous confirmation in it.[101] Leaving the old agent in unchallenged possession of the office, for Baldus the secret deposition does not amount to full deposition. The secretly deposed, therefore, may continue to validly discharge the office. Occult

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[96] *Supra*, note 50.
[97] Baldus, *ad* X.2.13.5, § *In literis* (*Baldvs svper Decretalibvs* (note 26), *fol.* 149*va*, n. 8): 'nec mirum quod aliquando decipiantur soluentes, quia legislator non est amicus errorem'.
[98] Cf. Baldus, *ad* X.2.13.5, § *Item cum quis* (*Baldvs svper Decretalibvs* (note 26), *fol.* 149*vb*, n. 3): '... habitus monachum non facit, licet ostendit eum monachum si sit ei impositus per habentem potestatem vel authoritatem.'
[99] *Ibid.*: ' ... Sed ecce aliquis tanquam prelatus agit contra debitorem ecclesie, debet debitor ostendere de prelatura, i(d est) de mandato: "alias non possum tibi soluere" ... dicit prelatus: "ego sum in possessione et publice vocor et tractur tamquam prelatus per alios vniuersos: ergo et per te debeo tractari." '
[100] *Ibid.*: '... dic quod sufficit prelato quod sit in vniuersali possessione: licet iste debitor nunquam agnouerit debitum nec fuerit confessus illum esse prelatum dummodo pro prelato publice reputetur: vt i(nfra) e(o titulo) c. in literis (X.2.13.5). Ego dico quod iudex cauere debet se ratum habiturum quod cum eo gestum erit vel non tenetur debitor soluere ... vt l. i § idem pomponius ff. quod cum fal(so) tut(ore) au<c>t(ore) (Dig.27.6.1.5) et ratione dubii videtur decretum.'
[101] *Supra*, note 86.

suspension from office is not as grave a penalty as deposition: hence the dispute among canon lawyers on the right of the prelate secretly suspended from office to continue administering it.[102] While Innocent solved that dispute applying the concept of jurisdictional toleration (focusing on the enduring *right* of the occult suspended to represent his office), Baldus highlighted the role of possession of that office. Since the occult suspended from office retained lawful possession of it, he could still discharge the office. The solution of Baldus was ultimately the same as Innocent. But its rationale was different: not proper agency (right to discharge the office), but lawful possession of the office.

The possession of the secretly suspended from office is clearly stronger than that of the simple intruder posing as agent. Unlike the payment to the agent apparent, for the secretly suspended there is no need of a judge sympathetic towards the debtor's mistake to hold the payment valid. At the same time, the difference with Innocent - stressing the lawful possession fo the office, not the enduring right to it - had important consequences. The validity of the payment to the occult suspended pertains only to the external side of agency: in our triangle, to the relationship between third party and office. As the superior authority withdrew its approval of the office holder, for Baldus the internal side of agency is compromised. This different approach allowed Baldus to conclude his reasoning in a very un-Innocentian manner: 'that who is occultly suspended may do anything as to the others, but not as to himself'.[103] If the suspended from office were to act for the office to make a transaction with himself, third party and individual who acts as agent would coincide. In such a case, the external side of agency would be just a replica of the internal side. Hence Baldus rejects the validity of the deeds done by the agent occultly suspended from office towards himself as private individual. In so doing, Baldus separates internal from external validity of agency to deny the first while allowing the latter. This has nothing to do with conflict of interest: the suspension of the agent is occult and so hidden to anyone - but for the agent.

If we look at the case of the secretly suspended from office keeping in mind the agency triangle, we might notice that Baldus draws it starting with the ‘angle’ of the third party, and analysing the relationship between third party and office first. Only then does he move to that between office and agent. The first relationship, designating the external side of agency, is valid. The other, pointing to the internal side of agency, is on the contrary deemed invalid. As always, the direction is important: had Baldus moved from the person of the agent, he would have reached the office first, and only then, finally, the third party. In such a case, it would have not been possible to justify the external validity of agency (the link office-third party) moving from the invalidity of its internal relationship (the link agent-office). Focusing on the right of the agent to represent the office, Innocent always moved from the internal side. So he required perfect symmetry between internal and external sides of agency. Baldus on the contrary moved from possession of the office: a concept insufficient for the internal validity of agency, but strong enough to justify the relationship between third party and office, in the person of its possessor.

At the same time, however, this kind of possession is different from that of the impostor. Alone, simple possession of the office cannot ascribe external validity to non-existing agency. Rather, the validity derives from the specific quality of this

[102] *Supra*, notes 88-89.
[103] *Supra*, note 92.

possession: not just *de facto* holding of the office (as an impostor would do), but lawful possession deriving from the 'vestige' of the previous full entitlement to it.
Just as in the case of the occult deposed, but more openly, in that of the occult suspended Baldus reaches the external validity of agency by blurring the difference between entitlement and possession. As said, Innocent did not write on the validity of the deeds of the prelate secretly deposed, but only of the secretly suspended from office (hence, perhaps, the reason why Baldus dealt more with this second case). The pope used this case to explain the difference between individual office and collegiate body. When a member of a collegiate office, such as a chapter, is suspended from office, he cannot exercise his prerogatives. The same however is not true for an individual office. The difference depends on the fact that no individual member of the chapter is himself the legal representative of the office, whereas the agent of the individual office is.[104] For Innocent, therefore, occult suspension does not undermine the internal validity of agency. As individual, the person is clearly *indignus* (both unworthy and legally unfit) of his office. But the fact that this *indignitas* is occult allows the person to be tolerated in office: shifting the accent on the persion *qua* agent, in other words, the pope allowed the *indignus* to retain the right to administer the office.
The Innocentian concept of toleration, we have seen, is rooted in the entitlement of a right – the right to represent the office validly. The unworthy tolerated in office, for the pope, retains full right to discharge the office; the moment he were to lose this right (i.e. the moment the internal side of agency were to be severed), the old incumbent would *ipso facto* become an intruder.[105] As there may not be different 'degrees' of toleration, the idea of a 'vestige' of previous confirmation in office is entirely alien to Innocent. Despite its name, the concept of toleration is rather inflexible. Opposing external validity to internal invalidity, Baldus trades toleration in office with lawful possession of it. This allows greater flexibility, for it severs the symmetry between the two sides of agency. But it also introduces an ambiguity not present in Innocent's elaboration: possession of the office is neither unlawful exercise of office, nor full entitlement to represent it.

Another interesting case where Baldus uses the concept of possession to make up for the invalidity of the internal side of agency is on invalid elections. To exercise an ecclesiastical office validly, as we have seen, Innocent required both election and confirmation in office. While confirmation can normally cure the defect in the election, it does not have the power to make up for the *ipso iure* void election. For Innocent, such is the case when the election was done in violation of natural (i.e., ultimately divine) law.[106] Innocent, it should be said, was not particularly clear on the

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[104] Innocent IV, *ad* X.1.4.8, § *Suspensus* (*Commentaria Innocentii Quarti* (note 27), *fol.* 34*ra-b*, n. 4); cf. *supra,* note 90.
[105] Innocent IV, *ad* X.5.1.24, § *Et famam* (*ibid., fols*. 495*vb*-496*ra*, n. 10): '… nisi esset in eum lata sententia depositionis, vel spoliatus esset insignibus dignitatis, tunc enim sententia a tali praelato lata, non tenet ff. de his qui no(tantur) infam(ia) l. secunda § igitur [*rectius*, § ignominiae, Dig.3.2.2.2], ff. de iudi(ciis) <l.> cum praetor (Dig.5.1.12pr) nec potest dici, quod toleretur, sed intrusus dicitur. Credimus tamen, quod ex quo sententia de aliquo crimine lata est contra aliquem sive criminaliter, sive civiliter agitur, quod episcopus vel praelatus suus potest eum spoliare beneficiis, quod sub eo habet, 2. q.1. <c.> multi (C.2, q.1, c.18) tamen debet eum vocare, et contra eum sententiam ferre, si invenietur, et si non inveniatur, eodem modo damnabit eum, quia notorum est crimen per sententiam'.
[106] Innocent IV, *ad* X.1.6.28, § *Propter bonum pacis* (*ibid*., *fol.* 59*rb-va*, n. 8-9): 'vix est electio, nisi omnia iura solennia obseruentur, et tamen ideo non est nulla, nec cassatur electio. In alio autem casu, scilicet, quando ea interueniunt, quare est nulla electio de iure positiuo, sed alia de iure naturali, tunc

point.[107] Instead of seeking to clarify what the pope left unsaid, however, Baldus focuses on the consequences of the invalid confirmation. If the underlying defect is manifest, the ensuing invalidity of the confirmation is clear. By contrast, where that defect is hidden, the solution is considerably more problematic. Both the superior authority confirming the unworthy in office and the third party dealing with him (as agent of the office) might well not be aware of the defect. When the ignorance of the third party is coupled with a similar ignorance of the superior authority, the problem becomes particularly difficult to solve. As we have seen, in principle the debtor should always ask the agent to prove his right to represent the office before paying to him what is due to the office.[108] In case of *ipso iure* invalidity of the election for an occult defect, however, the agent could well prove both election and, especially, confirmation. But if the confirmation may not cure the underlying invalidity of the election, distinguishing appearance from reality becomes almost impossible. This is why Baldus takes particular care in the way he describes such a case: the confirmation is valid, he says, 'so long as [the prelate] is in *possession* of the authority of the superior'.[109]

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distingue: quia si dolus vel delictum electi, vel eligentium fecit, quod electio sit nulla etiam de iure naturali, vt quia intrusus est vel simoniace electus, tunc semper habet locum regula praedicta, scilicet, quod deponatur ordinans et ordinatus, nec tenent ordinationes eorum, quod ad executiones, 62. distinct. c. i. (D.62, c.1) ... si autem dolus vel delictum non fuit tale, quod electionem faceret nulla, sed annullandam, vt contemptus alicuius qui electioni interesse debet, tunc non debet renunciare beneficium si quaesitum, nec peccat tenendo contra voluntatem contempti, nisi prohibeatur a iudice ... si autem deliquit tacendo irregularitatem suam, tunc omnibus modis debet offerre renunciationem suam, et peccat tacendo beneficium, sed tamen dispensabit superior in aliquibus irregularibus.' The distinction seems based on voidness vs. voidability: when the violation is of a human rule (i.e. positive law) but not of a natural law rule, then it is necessary to pronounce it void. The pronouncement is constitutive - it avoids the election. The difference is of great importance: until pronounced void, the voidable election also confers *executio*. This is the case, for instance, of the elected who did not disclose his personal incapacity. In such cases, concludes the pope, 'ordinationes eius executionem habet, quia non erat nulla electio de iure naturali, sed deponendus erat' (*ibid*., *fol.* 59*va*, n. 8).

[107] Regrettably, Innocent did not explain this difference in detail. More precisely, he did not say which rules in the election process were of natural law and which of positive law. The main example he gave of an election made in breach of natural law was remarkably ambiguous, for he referred to simony. Simoniacal elections are void also for natural law, said Innocent, so the elected ought not to be confirmed, but rather deposed together with the electors. *Ibid*. Commenting on the same chapter (but before distinguishing between violations of natural law and of positive law) Innocent considered *ipso iure* void also the election of the bishop made by the emperor or a king (*ibid., ad* X.1.6.28, § *infirmanda*, *fol.* 58*va-b*, n. 3-4). Such an election may be quashed even after the confirmation, despite that both confirmation and consecration be formally valid ('licet confirmatio et consecratio rite factae sint', *ibid*., *fol.* 58*vb*, n. 4). The ambiguity lies in that, arguing that simoniacal elections remain *ipso iure* void would clash with all the cases where the same Innocent used the occult simoniac confirmed in office as an example of toleration: see esp. *ibid.,* Id., *ad* X.3.2.7, § *Operis* (*ibid., fol*. 350*ra*, n. 2). While the point remains unclear (Baldus for instance thought that Innocent had simply changed his mind: Baldus, *additio ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 59*rb*, n. 9), it would seem that, in giving the example of simoniacal ordinations as a case of violation of natural law, the pope was focusing on sacramental issues, not jurisdictional ones. Indeed, the only reference provided by Innocent on the consequences of simoniacal elections in that passage was a text of the *Decretum* (D.62, c.1), which held void the simoniacal election of a bishop, and similarly avoided the ordinations made by such *pseudoepiscopi*. Dealing only with sacramental issues, the text however left untouched the validity of the administrative (and so, jurisdictional) deeds of the same 'pseudo-bishops'.

[108] *Supra,* note 99.

[109] Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fol.* 218*va*, n. 73): 'Premitte quanquam ille qui est in possessione est funditus falsus praelatus: et talis possessio non patrocinatur ... quanquam non est funditus falsus, quia habet confirmationem superioris, tunc autem confirmatio est nulla ipso iure: aut valet licet confirmatus si indignus: prio<re> casu aut est vitium

To understand this point, we should think again of the case of occult deposition from office in Baldus. Leaving the agent in possession of the office, the occult deposition did not fully sever the link with the superior authority that previously confirmed him in office. The link was almost severed, but not fully. There was only a 'vestige' of it. And the enduring possession of the office was the tangible evidence of that 'vestige'.
In the case of confirmation of an *ipso iure* void election, on the contrary, the link between agent and superior authority is void from the outset. So the concept of possession is not referred to the office, but directly to the authority of the superior. If If occult deposition was already a rather ambiguous concept (lying mid-way between proper agency and 'standard' deposition), this new one is even more so. It is not surprising that the idea of possessing the confirmation (instead of being confirmed) is nowhere to be found in Innocent. At the same time, however, the pope did not fully explain the consequences of an *ipso iure* void election either. This left a gap that could not be filled (at least, not in a satisfactory manner) relying only on the full symmetry between internal and external validity of agency. Internal validity required valid confirmation, but the latent defect leading to the *ipso iure* invalidity of the appointment was an insurmountable obstable to that. To be valid, confirmation in office required full knowledge of the defect[110] (which here on the contrary was unknown even to the superior authority), and in any case it could not cure those defects leading to the *ipso iure* invalidity of the appointment. Ambiguous as it may be, the idea that the elected who may not be confirmed in his office receives possession of the authority of the superior was a brilliant solution. Here as well, possession solved the impasse because of its greater flexibility than the concept of entitlement. Moving the focus away from the relationship person-office and towards that elected-superior authority, it circumvents the limits of the Innocentian concept of toleration while at the same time relying on it, for it shifts the perspective from the *indignitas* of the agent to the superior *dignitas* of the higher authority. The question now is no longer of entitlement to the office, but of higher jurisdiction: 'As the superior considers him as [confirmed], so anyone else must consider him such'.[111]
Stating as much, Baldus refers to the same text invoked in his discussion on the payment to the agent apparent: the ratification of the false guardian's deeds by the praetor (Dig.27.6.1.5).[112] This is important. The agent apparent, as we have seen, insisted on his right because 'all others' held him as true representative of the office.[113] Those 'others', however, were all third parties. Hence the need to invoke the *iurisdictio* of the magistrate: the debtor was not released from his debt to the office

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patens et repellitur, aut latens et non repellitur, ar(gumentum) ff. de mi(noribus) l. verum § ex facto (Dig.4.4.11.2) et l. minor xxv an. ex aspectu (Dig.4.4.32) ... Secundo casu non repellitur quamdiu est in possessione autoritate superioris, ar(gumentum) de off(icio) presi(dis) (*sic*) <l.> barbarius (Dig.1.14.3), de rescri(ptis) <c.> sciscitatus (X.1.3.13) per Innoc(entium)' (emphasis added). Cf. Innocent IV, *infra,* note 146.

[110] Cf. Innocent IV, *ad* X.1.6.32, § *Confirmauit* (*Commentaria Innocentii Quarti* (note 27), *fol.* 63*ra-b*, n. 1-2): 'confirmatio electionis tenet etiam si electio fit nulla, dummodo fiat ex certa scientia confirmationis, et durante voluntate eligentium ... Item confirmatio semper fieri debet cum causae cognitione, scilicet vt semper inquiratur de forma, et processu electionis, et de persona electi. inf(ra) eo (titulo) <c.> nihil (X.1.6.44) et nisi inquiratur non valet confirmatio, arg(umentum) prae(dictae) decre(talis) nihil, ff. de transact(ionibus) <c.> cum hi § si praetor (Dig.2.15.8.17)'. Cf. A. Agostinelli, *Il funzionario di fatto*, Campobasso 1920, p. 53.

[111] Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fol.* 218*va*, n. 73): '... nam ex quo superior eum habet pro tali ergo a quolibet alio debet haberi, ff. quod fal(so) tu(tore) au<c>t(ore) l. i § item pomp(onius) (Dig.27.6.1.5).'

[112] Compare last note with note 100.

[113] *Supra*, note 99.

because of the common mistake as to the status of the agent apparent, but because of the superior authority of the judge. In case of *ipso iure* void election invalidly confirmed by the superior authority, on the contrary, the agent apparent does not rely on a wide but mistaken belief as to his condition, but on the same authority of the judge. A superior authority has by definition a higher *iurisdictio*.[114] And this is why 'anyone else must consider him such [i.e. as confirmed]': because they cannot refuse the superior *iurisdictio* of the higher authority who considers the agent apparent as true agent. Being 'in possession of the authority of the superior' ultimately means being able to invoke the same higher *iurisdictio* in support of an otherwise invalid title.

Referring the possession not to the office but to the approbation of the superior authority of course does not make up for the lack of the underlying right to represent the office, but it leads as close as possible to that result.[1] To do that, Baldus changes the perspective of the agency triangle. In this case, it is the agent who invokes the superior before the third party. The triangle is not drawn from the third party to the office, but from from the agent to the office, and only then towards the third. This gives strength to the conclusion, for the starting point (from agent towards office) points to the internal side of agency, and only then the external side (the relationship office-third party) comes into the picture. In other words, it is on the basis of the possession of internal validity that the agent apparent is able to exert full external validity. Because of this shift in perspective, while falling short of establishing proper agency, the concept of possession allows for a subtle approximation to it.

3.4. Possession vs. entitlement: the case of the *lex Barbarius*

The most important case where Baldus severs the symmetry between internal and external validity of agency is in his comment on the *lex Barbarius* (Dig.1.14.3). That is a complex case of a runaway slave mistakenly believed Roman and elected to the praetorship. Because of the importance of that case to our purposes, it could be useful to provide its text:[115]

> Barbarius Philippus, while he was a runaway slave, stood as a candidate for the praetorship at Rome, and was designated praetor. Pomponius says that his condition as a slave was no obstacle to him: as a matter of fact, he did exercise the praetorship. But let us consider: if a slave, so long as he hided his condition, discharged the office of praetor, what are we to say? That the edicts and decrees he issued will be null and void? Would that go to the benefit of those who sued in his court on statutory grounds or on some other legal grounds? I think that none of these deeds should be set aside. This indeed is the more humane view to take, since the Roman people had the power of confering this

[114] It is the higher *iurisdictio* that defines the higher authority, and so the quality of being *superior*: the higher authority is *maior* in that it may judge the *inferior*. Hence the maxim 'that who judges me is [my] lord' ('*qui me iudicat dominus est*'), on which see e.g. the coronation sermon of Innocent III, *In consecratione Pontificis Maximis*, *Sermo* II (in Id., *Opera*, Coloniae, apvd Maternvm Cholinvm, 1575, p. 189). Cf. Huguccio's *Summa*, *ad* C.2, q.5, c.10 (Admont, Stiftsbibliothek, MS 7, *fol*. 159*va*, transcription in R. Maceratini, *Ricerche sullo status giuridico dell'eretico nel diritto romano-cristiano e nel diritto canonico classico: da Graziano ad Uguccione*, Padova 1994, p. 624).

[115] Dig.1.14.3 (Ulp. 38 ad Sab.): 'Barbarius Philippus cum servus fugitivus esset, Romae praeturam petiit et praetor designatus est. Sed nihil ei servitutem obstetisse ait Pomponius, quasi praetor non fuerit: atquin verum est praetura eum functum. Et tamen videamus: si servus quamdiu latuit, dignitate praetoria functus sit, quid dicemus? Quae edixit, quae decrevit, nullius fore momenti? An fore propter utilitatem eorum, qui apud eum egerunt vel lege vel quo alio iure? Et verum puto nihil eorum reprobari: hoc enim humanius est: cum etiam potuit populus Romanus servo decernere hanc potestatem, sed et si scisset servum esse, liberum effecisset. Quod ius multo magis in imperatore observandum est.'

> authority to a slave. And if they had known that he was a slave, they would have set him free. And the same power must all the more apply in [the case of] the emperor

The text presents several difficulties,[116] but to our purposes the crucial element is Ulpian's conclusion in favour of the validity of the deeds despite the servile condition of the praetor - and so his invalid appointment. The problem was how to justify that conclusion. From the Accursian Gloss onwards, the standard approach was to presume the exercise of the sovereign power of the people or the emperor towards the person of Barbarius: his emancipation would cure the invalidity of the election, and so lead to the validity of the deeds done as praetor.[117] Baldus sums up well this approach: 'the deeds depend on the status, for if [Barbarius] was not praetor and free, his deeds would not be valid. Hence he is praetor and free, so that his deeds be valid.'[118] To save the validity of the acts, in other words, it was necessary to rescue their source first. The problem was that the text of the *lex Barbarius* was clear in denying that the Roman people or the emperor had actual knowledge of Barbarius' servitude.[119] What the Gloss did amounted to forcing their hand and presuming a will they clearly did not possess in order to square the circle. Because of that, the interpretation of the Gloss came progressively under attack. Especially after the open critique of the most illustrious among the law professors of Orléans,[120] Baldus was not prepared to endorse it. The slave had therefore to remain such. But this also meant that there could be no full internal validity to the relationship between agent and office of praetor.[121] How could it be possible, then, to hold valid the deeds of the praetor apparent towards the litigant parties?

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[116] See esp. N. Rampazzo, *Quasi Praetor non fuerit. Studi sulle elezioni magistratuali in Roma repubblicana tra regola ed eccezione,* Napoli 2008, pp. 366-379, 411-414 and 474-485; R. Knütel, *Barbatius Philippus und seine Spuren*. *Falsus praetor, parrochus putativus, Scheinbeamter,* in D. Schwab, D. Giese, J. Listl, and H.-W. Strätz (eds.), *Staat, Kirche, Wissenschaft in einer pluralistischen Gesellschaft,* Berlin 1989, pp. 345-365, at 345-353; M. Lucifredi Peterlongo, *Contributi allo studio dell'esercizio di fatto di pubbliche funzioni,* Milano 1965, pp. 49-84. Cf. also H. Herrmann, *Ecclesia Supplet. Das Rechtsinstitut der Kirchlichen Suppletion nach c. 209 CIC*, Amsterdam 1968, pp. 66-73.

[117] Gloss *ad* Dig.1.14.3, § *Effecisset* (*Pandectarvm Ivris Civilis* (note 16), vol. 1, col. 131): 'id est efficere potuisset. Vel credimus quod fecisset potius quam dignitatem eriperet ... Accursius.' Cf. also Gloss *ad* Cod.7.9.1 (*ibid.,* vol. 4, col. 1537), § *manumissus est*: 'sic ergo potest dari libertas: vt et ff. de offi(cio) praeto(rum) l. Barbarius (Dig.1.14.3).'

[118] Baldus, *repetitio ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 57*vb*, n. 10): '... gesta dependent a statu, quia si non esset praetor et liber, non ualerent acta per eum, vt ergo ualeant acta per eum, ideo est praetor et liber.'

[119] *Supra*, note 115.

[120] See esp. the *lectura* of Guido de Cumis *ad* Dig.1.14.3 (Wien, Österreichische Nationalbibliothek, MS 2257, *fol.* 74*rb*-*va*), and the *repetitiones* on the same Dig.1.14.3 of Jacques de Révigny (Leiden, University Library, MS d'Ablaing 2, *fols.* 17*vb*-18*va*) and of Pierre de Belleperche (Madrid, Biblioteca Nacional de España, MS 573, *fols.* 85*vb*-86*va*). See further Rossi, *Representation and Ostensible Authority in Medieval Learned Law* (note 72).

[121] This time, Baldus found in Innocent IV not an ally but an opponent, for the pope interpreted the *lex Barbarius* in the same way as the Gloss: the wanting position of the slave was ratified by the emperor. Innocent did so to avoid a dangerous objection against his strict rules on confirmation as *conditio sine qua non* to validly discharge the office. Innocent IV, *ad* X.3.36.8, § *Cvm dilectvs filivs* (*Commentaria Innocentii Quarti* (note 27), *fol*. 437*vb*, n. 2): 'Item non est contra ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.14.3) vbi dicitur, quod sententiae latae ab eo, qui erat in possessione tenent, licet praetor non esset, sed ibi respondent, illud ideo esse non potest, quia in possessione erat, quia vere iudicandi potestatem acceperat ab Imperatore, et omnia alia faciendi, quae ad praetorem pertinebant, licet non esset legitimus praetor, sed per obreptionem.'

Baldus' answer, once again, is based on the shift from proper entitlement to lawful possession of the office. In Roman law, the lawfulness of possession depended on the moment of its acquisition. It was therefore necessary to find a way to argue for Barbarius' lawful acquisition of the *possession* of the praetor's office. Baldus finds it in the voidability of Barbarius' election. Because the election was not utterly void (it was valid as to its form, but invalid because of the - occult - condition of the elected),[122] says Baldus, the slave is not a mere intruder in office.[123] On the contrary, he acquires a 'true but revocable' praetorship:[124]

> if the question is whether Barbarius had a firmly rooted (*radicatam et incommutabilem*) praetorship, the answer is no. But the answer is different if the question is whether he had a true and revocable praetorship though unworthily (*indigne*) received, all the more while the defect remains hidden

The revocability of the office depends on the lack of 'rooted' praetorship. Ordinary jurisdiction, says Baldus, must 'take root' in its incumbent.[125] This particularly strong image, signifying the compenetration between agent and office, is used to exclude the *inhabilis* (i.e. the *indignus* in its legal meaning). The legal incapacity of the slave prevents that jurisdiction to 'take root' in his person.[126] A 'rooted' (*radicata*) praetorship would be tantamout to 'unalterable' (*incommutabilis*), whereas Barbarius' praetorship was 'revocable' (*revocabilis*).[127] Just as Barbarius could not have a 'rooted' praetorship, he could not enjoy 'rooted' ordinary jurisdiction deriving from that office.[128] That would exclude full entitlement to the office, but not legitimate possession of it. Hence Baldus' remark that Barbarius' revocable praetorship was 'true'.[129]

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[122] Baldus, *lectura ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 55*vb*, n. 22): 'opponitur non valeant gesta a minus legitime electo, ut l. actuarios, C. de nume(rariis) et actuar(iis) lib. xii (Cod.12.49(50).7) et ibi no(tatur) ergo non valent gesta Barbarii. So(lutio) Barbarius fuit rite assumptus, licet non recte, sed in l. contraria non fuit rite electus, quia per non habentes potestatem, et quare non seruata forma a superiore praefixa, et sic non ob(stat), quia rite factum non valet ipso iure, sed rite factum licet non recte per eum, qui habet potestatem, valet, licet debeat cassari, si debito modo cassatio petitur.'

[123] Baldus, *lectura ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 55*vb*, n. 23): 'notandum tamen est quod propter bene agere non iustificat intrusus, quia nec Barbarius iustificat omnino in semetipso, dato quod non esset proprie intrusus'.

[124] *Ibid., fol.* 55*va*, n. 20: '... aut quaeritur, vtrum Barbarius habebat praeturam radicatam, et incommutabilem; et dico quod non, aut vtrum habebat veram praeturam reuocabilem, tamen tanquam collatam indigne: et videtur quod eam (sic) fortius est quandiu latuit vitium, et defectus'.

[125] On the point, canon law has not changed much over the centuries. A good way of explaining Baldus' statement is comparing it with the 1917 Canon law Code, can. 197 §1: 'Ordinary power of jurisdiction is that which is automatically attached to an office; delegated power is that which is committed to a person' (*Potestas iurisdictionis ordinaria ea est quae ipso iure adnexa est officio; delegata, quae commissa est personae*).

[126] Baldus, *lectura ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 55*va*, n. 19): '... sed iurisdictio ordinaria debet esse radicata, sed in seruo non potest radicari'.

[127] *Supra*, note 124.

[128] For the medieval jurists, the Roman praetor was an ordinary judge. This appears clearly in Barbarius' case. See e.g. Gloss *ad* Dig.1.14.3, § *Vel lege* (*Pandectarvm Ivris Civilis* (note 16), vol. 1, col. 130): 'id est iudicio ordinario peracto'. Cf. Gloss *ad* Coll.4.2.3(=Nov.23.3), § *Illo videlicet* (*ibid.,* vol. 5, col. 205). See further the *Speculum* of Guillaume Durand, lib. 1, partic. 1, *De Iurisdictione omnium iudicium*, 1. § *Expedito* (*Gvl*[*ielmi*] *Dvrandi Episcopi Mimatensis I.V.D. Specvlum Ivris ...*, Basileae, apvd Ambrosivm et Avrelium Frobenios Fratres, 1574; anastatic reprint, Aalen 1975, vol. 1, p. 134, n. 5).

[129] *Supra*, note 124.

When looking at the occult deposition or suspension of the agent from office, and his *ipso iure* void appointment and confirmation for an occult defect, we have see how Baldus replaced the concept of entitlement to represent the office with that of possession (whether directly of the office or of the confirmation in it). This allowed overcoming some strictness and gaps in Innocent's approach, based as it was on the concept of right and never of possession, even if the price to pay was an ambiguity unknown to Innocent. Baldus used the idea of lawful possession as a bridge between simple facts and proper rights. This bridge was enough to move beyond the first, but not to reach the second. Hence the ambiguity. Applied to incorporeals, the ambiguity of the concept of possession could only increase. This further ambiguity could be played to the advantage of Baldus' ultimate purpose: allowing for an even deeper separation between internal and external validity of agency. Once again, Baldus reaches as much by building on Innocent IV first, and then progressively detaching himself from the pope.

Offices are incorporeal.[130] Following Innocent, Baldus denies that (quasi-)possession of the office might entitle to its valid exercise. To that end, it is necessary the confirmation by the superior authority.[131] However, the incorporeal condition of the office does not allow to think of different degrees of possession: either there is full possession of the office or there is none. This is what allows Baldus to reach his aim.

Offices, says Baldus, are formal entities: they have a form but no specific matter. Their form is given by the law, on the basis of the purpose for which they are established.[132] Thinking of unlawful but legally relevant possession is therefore only possible for corporeals, not also for incorporeals and even less for offices. The relationship between agent and individual office makes the concept of possession of an office significantly stronger than that of possession of a thing. Possessing an office means vesting the agent with it. Hence there is full possession or no possession at all: as Baldus puts it, one may not be a 'quasi-bishop'. Possession of an office, he continues, pertains to the law, not to the realm of facts.[133] Possession of a *dignitas*

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[130] As such, we have seen, their possession - just as that of other incorporeals - is typically described as *quasi possessio*: cf. *supra*, § 2.3 and § 3.2, esp. note 84.

[131] This is particularly clear in Baldus' *repetitio* on the *lex Barbarius*, where he relies on Innocent IV's distinction between cases of *quasi possessio* in which no confirmation is required and cases in which it is needed. Clearly Innocent had in mind ecclesiastical offices, but the distinction is useful for Baldus so as to deny the full validity of Barbarius' appointment. Baldus, *repetitio ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 58*ra*, n. 12-13): 'Item opp(onitur) et videtur quod acta valeant *de rigore iuris* ex quo barbarius erat in quasi possessione officii. Nam sola quasi possessio sufficit in *temporalibus*, extra de iure pat(ronatus) c. consultationibus (X.3.38.19). Sol(utio) dicit Innocen(tius) quod illud est verum in his quasi possessionibus in quibus non requiritur decretum superioris, vel in quasi possessione iuris eligendi, et praesentandi; secus vbi requiritur auctoritas superioris. Nam si illa sit interposita de iure, valet quod fit de rigore. Si autem de facto, loquitur haec lex, et Inno(centius) de elec(tione) c. nihil (X.1.6.44).'

[132] On the point see esp. Baldus, *ad* Cod.2.18.20, § *Tutori vel curatori* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fol.* 142*ra*, n. 1): 'Tutor vel curator differunt a gestore: quia primorum officium est necessarium et finitur necessitate cessante. sed officium simplicis gestoris est voluntarium et voluntate propria terminatur. ... Officium quod habet formam a iure sumit effectum vel finem secundum dispositionem legalem. Sed officium quod suscepit quaelibet formam secundum voluntatem gerentis regulatur ab ipsa.'

[133] Baldus, *ad* Cod.3.34.2, § *Si aquam* (*ibid., fol.* 218*rb*, n. 64-65): 'Nunc de quarto puncto dicendum est s(cilicet) qualiter possessio perdatur. Circa quod dicendum est quod duplex est possessio. Quedam est enim indiuisibiis, vt ecce papa et imperator possident plenitudinem potestatis, ecclesia et imperium se non secat in partes: nec diuidit se. Item dignitates sunt indiuisibiles: vnde non potest quis esse semiepiscopus vel semidoctor. Item et seruitutes vnde non potest quis habere semiuiam et semiusum. Sunt enim omnes seruitutes in forma indiuisibili constitute: que forma nisi per perfectione haberi non

ultimately refers to the lawful exercise of the office. Indeed, says Baldus following again Innocent IV, 'dignity, administration, jurisdiction and office are mutually connected and almost inseparable'.[134]

The closeness between lawful possession of an office and its lawful exercise has another and very important consequence: the possessor does not need to justify his possession. A well-established principle, clearly stated in the Accursian Gloss, was that the judge does not need evidence to prove what is notorious (and so known to everybody), but he does to prove what is known to him personally.[135] In recalling this principle, Baldus applies it to the exercise of an office. If reiterated and unchallenged, the exercise of an office becomes notorious. Widespread reputation as the rightful representative of an office, therefore, exhonerates the incumbent from having to prove his underlying right to it, for it presumptively suggests *de iure* entitlement to the office.[136]

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potest vnde entibus imperfectis non proprie conuenit forma ff. ad l. falci(diam) l. si is qui quadringenta § quedam (Dig.35.2.80.1). Quedam sunt possessiones diuidue, vt possessio agri et possessio vsufructus: quia vsufructus non solum est qualis sed est quantus. ... Item no(tandum) quod quedam sunt possessiones quae constitunt officio vel dignitate et sic constitunt in iure, et iste statim perduntur quod quis est priuatus dignitate: vt no(tat) Inno(centius) de conces(sione) preben(dae) c. cum nostris (X.3.8.6) ... quedam sunt possessiones que constitunt in facto vt possessio fundi: tunc requiritur amotio facti nec sufficit amotio iuris ...'

[134] *Ibid.* (*fol.* 217*va-b*, n. 48): 'Nunc accedamus ad Inno(centium) in c. ex literis, de resti(tutione) in integrum (X.1.41.4), et ibi tractat Inno(centius) qualiter acquiratur possessio generalis et specialibus in iuribus et in rebus ... Primo ergo queritur qualiter acquiratur possessio iuris episcopalis vel archidiaconalis ... dicit Innoc(entius) quod possessio generalis iuris episcopalis acquiritur per installationem factam in sede deputata in tali dignitate, ar(gumentum) C. de offi(cio) prefec(ti) aug(ustalis) l. i (Cod.1.37.1) ... secundum Inno(centium) intellige quod acquiratur generalis possessio dignitatis et administrationis et iurisdictionis: nam dignitati inest administratio et administrationi inest iurisdictio: vnde sunt annexa et quasi inseparabilia dignitas et administratio et iurisdictio et officium, s(upra) vbi et apud quos l. fi. (Cod.2.46(47).3).'

A similar reasoning might be found in Bartolus. Significantly enough, however, in Bartolus the object of *quasi possessio* was not the office of the judge, but simply his jurisdiction. A forged rescript of the prince, says Bartolus, is clearly not sufficient to confer proper entitlement. But if it looks genuine, it would suffice to give *quasi possessio* of jurisdiction, and so to allow its recipient to render valid decisions. Bartolus, *ad* Cod.1.22.2 (*In Primam Partem Codicis Bartoli a Saxoferrato Commentaria* (note 84), p. 110, n. 6): 'Quaero utrum rescriptum omnino falsum quod nunquam emanavit de cancelleria Principis tribuat iurisdictionem? ... Mihi videtur quod, si quidem rescriptum non habet manifestam falsitatem, ipse iudex, cui videtur dirigi, potest de ista falsitate cognoscere et pronunciare se esse vel non esse iudicem. Ita intelligo infra l. prox(imam) [*scil.*, Cod.1.22.3], ubi coram eodem iudice potest opponi de falsitate. Ratio: quia illud rescriptum, licet ei non det iurisdictionem, tamen constituit eum in quasi possessione iurisdictionis, propter uod habet iustam cognitionem et pronunciatonem.'

[135] Gloss *ad* Cod.2.41(42).1, § *In consilio* (*Pandectarvm Ivris Civilis* (note 16), vol. 4, col. 378): 'i(d est) in arbitrio siue deliberatione iudicis. Et no(tandum) quod iudex potest iudicare siue attendere id quod ei est notum vt notorium: etiam si ei non probatur ab aliqua partium. Erat enim hic notorium eum fuisse decurionem. Secus si est notum non vt notorium, sed vt priuato: quia tunc magis ad probationem respicit: vt ff. de offi(cio) praesi(dis) l. illicitas § veritas (Dig.1.18.6.1), et i(nfra) de his qui ve(niam) aeta(tis) impe(traverunt) l. ii (Cod.2.44(45).2).'

[136] Baldus, *ad* Cod.2.41(42).1, § *In consilio* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fols.* 154*vb*-155*ra*, n. 7): 'Tertio opp(onitur) quando enim iudex hic considerat publicum officium cum de hoc non esset aliquid sibi probatum ab aliqua partium respondet glo(sa) quod hoc erat notorium. Ubi ergo officium est notorium non est necessaria probatio, gl(osa) loquitur in officio ordinario. Si ergo quis publice gessit se pro potestate vel vicario licet non appareat de electione tamen semper presumitur pro ordinaria iurisdictione. Item si quis se gessit pro priore vel consule mercatorum et sic fuit reputatus publice, facit l. barbarius de of(ficio) preto(rum) (Dig.1.14.3). Facit etiam l. ciues et incole i(nfra) de ap(pellationibus) (Cod.7.62.11). Sufficit ergo quod sit notorium quod aliquis gessit se pro potestate priore vel consule ... in notoriis iudex supplet defectum probationis partium'.

When the lawful possession of the office does not derive from *de iure* entitlement to it (as in the case of Barbarius), proper representation may not occur. Even so, such a possession allows for a shift in perspective, albeit a partial one: if not from individual person to lawful agent, at least to lawful possessor of the office. The importance of this shift lies in that, as we have just seen, the notorious possession of an office leads to the presumption of valid representation.[137] As long as this presumption holds, the exercise of jurisdiction is therefore valid. This, says Baldus, means that the slave Barbarius might even punish those who would recuse his jurisdiction as praetor - unless of course they could prove his servile condition and so disprove the above presumption.[138] The power to impose one's jurisdiction over the litigants is not mutually incompatible with the litigants' ability to disprove the validity of that same jurisdiction. If the litigants were to prove the true status of Barbarius, his possession of the office would change from notorious (and so, presumptively lawful) to manifestly abusive.[139]

The crucial point is that, until disproven, the notorious possession of an office is sufficient to its lawful exercise. On a practical level, this brings possession of the office very close to full representation, while remaining different in principle. The issue of recusation helps to clarify the difference. When the office is 'rooted' in the person, the agent may continue to validly represent the office despite the supervening incapacity: the friction between incapacity *qua* individual and capacity *qua* agent is precisely the core of Innocent IV's concept of toleration, which is ultimately a way of prolonging the validity of proper representation by stressing the link between agent and office and underplaying the (typically, supervenient) unworthiness of the

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[137] Baldus, *lectura ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 56*va*, n. 35): '... Et no(tandum) quod materia l(egis) nostrae habet locum in his, quae sunt ratione publici officij, non in alijs, extra de consuet(udine) c. <cum> dilectus (X.1.4.8) secundum Innoc(entium), et in his quae tangunt ius aliorum, non solius facientis, vel patientis, extra, de procu(ratoribus) <c.> consulti (X.1.38.15) per Inno(centium). Illud est no(tandum) quod pro eo qui in possessione iurisdictionis ordinarie inuenitur, praesumitur, licet hic status naturaliter inesse non possit, de offi(cio iudicis) deleg(ati) <c.> cum in iure (X.1.29.31), per Ino(centium) etc. ... arg(umentum) contrarium: quia nemo praesumitur officialis, nisi probetur, l. prohibitu(m) C. de iur(e) fi(sci) lib. x (Cod.10.1.5), vide Cy(num) C. vbi causa sta(tus) l. i. Et no(tandum) quod lex loquitur de eo, qui non debuit admitti ad officium: tamen admissus est.' Cf. Cinus de Pistoia, *ad* Cod.3.22.1 (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi, id est Digesti veteris, doctissima commentaria* ... Francofurti ad Moenum, Impensis Sigismundi Feyerabendt, 1578; anastatic reprint, Frankfurt-am-Main 2007, vol. 1, *fol.* 152*rb*, esp. n. 7).

[138] Baldus, *lectura ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 55*vb*, n. 26): 'Et adde, quod ille qui sine causa declinat iurisdictionem, potest puniri de contemptu 2 q. 7 c. Metropolitanum (C.2, q.7, c.45), in glo(sa) et Inn(ocentius) dicit quod potest verus contumax reputari, quia non videtur stetisse declinans suam iurisdictionem, secundum Innocentium, et ideo Barbarius potuisset punire friuole declinantes suam iurisdictionem, puta quia opponebatur alia exceptio quam seruitutis, vel obiecerunt de servitute, et non provaverunt'.

On the subject see also Baldus, cons.2.177 (*Consiliorvm sive Responsorvm* (note 28), *fol.* 48*rb*). Asked whether the defendant had the power to jail someone, Baldus answered that they did: just like Barbarius, they had *quasi possessio* of jurisdiction, and that was sufficient as to exercise it. 'D(omini) Antiani sunt in quasi possessione istius iurisdictionis, quod sufficit ad eius exercitium, vt ff. de offi(cio) prae(torum) l. Barbarius (Dig.1.14.3)'.

[139] Baldus made the same point (though in a less elaborate fashion) when discussing on possessory matters, so as to distinguish between *falsus praelatus* in unchallenged possession of the office and simple intruder. Baldus *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fol.* 218*ra*, n. 62): 'Aut quis est in possessione sed non est verus prelatus: et tunc aut possidet pro prelato ita communiter reputatur, aut pro possessore quia inuasit de facto officium prelati. Primo casu agere potest nisi aduersarius probet eum non prelatum: quia pro eo presumitur qui in pacifica possessione reperitur'.

individual serving as agent. When the person *qua* agent is entitled to represent the office, then the condition of the person *qua* individual, so long as non manifest, is of no obstacle to the continuation of valid representation. In that case, says Baldus, those subjected to the (jurisdiction of the) office could not recuse its legal representative because of his personal unworthiness.[140] By contrast, when the person has just notorious possession of the office but not a proper right to hold it, the link between agent and office is more fragile: when the personal incapacity of the possessor becomes manifest, the link between possession and lawful exercise of the office is severed.

Lawful possession of the office without *de iure* entitlement to it ultimately leads to the same consequences as the case of the occult deposition. Neither the occult deposed from office nor the slave mistakenly considered as praetor are *de iure* agents of the office they possess: in both cases, there is no valid internal agency. The validity of their deeds – and so, the external validity of agency – rests only on the lawful possession of the office. In both cases the notoriety of their possession is not (or no longer) coupled with the underlying right to discharge the office they publicly possess. This is why secret deposition did not produce the full consequences of manifest deposition: the difference does not lie in the lack of physical dispossession, but in the public or occult character of the deposition itself. Not issuing a formal sentence of deposition (which would have made the deposition notorious)[141] could be construed as a partial revocation of the initial confirmation by the superior authority, a revocation that does not produce its full effects. This allowed Baldus to speak of a 'vestige' of the initial confirmation in office, and so to argue for a fragile but enduring link with the office itself.[142]

In the case of the slave-praetor Baldus ultimately adapts the same reasoning to different circumstances. Rejecting the solution of the Gloss (presumed emancipation of the slave to rescue his praetorship), Baldus leaves Barbarius in his servile condition. At the same time, however, he does not condemn the praetorship as well: Barbarius' *praetura* is 'true' even if 'revocable'.[143] Almost paradoxically, the revocability of the praetorship is what makes it 'true'. The election is voidable – and not utterly void - because the personal defect (slavery) is not manifest. Just as the secretly deposed, the incapacity of the agent is occult. In one case (secretly deposed) this occult character of the legal impediment allowed to retain lawful possession of the office, in the other (slave-praetor) it allows its acquisition: Barbarius can enter lawfully in office, and so he acquires lawful possession of it. If the defect in the person were to become known, the slave-praetor would of course lose lawful

[140] Baldus, *ad* X.1.3.13, § *Sciscitatus* (*Baldvs svper Decretalibvs* (note 26), *fol.* 28*ra-b*, n. 8): 'Quero an <iudici> ordinario possit opponi exceptio quod est homicida vel adulter. Respondeo non secundum Inn(ocentium) quia autoritas ordinarij officij non excluditur per solam infamiam facti superuenientem officio iam radicato.'

[141] Even if the crime is not manifest, says Baldus elsewhere, the legal condemnation makes it notorious. The crime is not manifest in itself, but it is presumed to be such. And this presumption is irrebuttable. The sentence of deposition of the unworthy, therefore, operates on two levels: it both renders the *indignitas* notorious and it establishes judicially its truth. Cf. Baldus, *ad* X.3.2.7, § *Vestra* (*Baldvs svper Decretalibvs* (note 26), *fol.* 259*rb*, n. 2): 'Sed pone quod nullo modo factum est probatum [the subject was the fornicating priest], et tamen sententia condemnatoria est lata: nunquid crimen dicatur notorium? Respondeo sic, propter authoritatem sententie que habetur pro veritate, vt ff. de re(gulis) iur(is), l. res iud(icata) (Dig.50.17.207).'

[142] *Supra*, note 86.

[143] *Supra*, note 124.

possession of the office – but so would the occult deposed if his deposition became manifest. Until that moment, however, both slave and deposed would retain lawful possession of an office to which neither is entitled.

Possession is the visible face of the underlying right. It does not look at the inner relationship between person and thing (the entitlement to it), but at its external manifestation. It should project to the outside the consequences of that entitlement, that is, the right to hold the thing - in our case, to exercise the office validly. Speaking of possession of the office, Baldus highlights the external face of representation without bestowing validity to the internal relationship between person and office. While the agency triangle is always the same, the focus is no longer on the internal side (person-office) but on the external one (office-thirds).
We have seen this shift in focus with regard to the agent secretly deposed from office: relying on possession, Baldus could argue for the validity of his deeds without however qualifying that case as toleration - and so, proper representation. The occult deposed is thus neither an intruder (in which case there would be no external validity of agency) nor properly tolerated in office (where on the contrary there would be full internal validity of agency). Stressing the occult character of the deposition, Baldus highlighted the (limited) lingering effects of the confirmation by the superior authority (the 'vestige' of confirmation in office). This way, he could push the occult deposition just outside the threshold of proper representation - but very (and ambiguously) close to it. In the case of the occult slave discharging the office of praetor, Baldus moves from the opposite direction to arrive to the very same point: he pulls the slave-praetor towards representation, coming as close as possible to its threshold without crossing it - and so without reaching the scope of agency. Just as the occult deposed from office, also with the slave Barbarius the practical outcome is very similar to proper toleration in office. In principle, however, the difference between title and possession remains clear. This avoids a plain self-contradiction: the Innocentian concept of toleration presupposes confirmation, but confirmation would lead to the same position of the Gloss (emancipation of the slave leading to *de iure* validity of his praetorship, and so full symmetry between internal and external validity of agency). Stressing the element of possession of the office, and especially of its ordinary jurisdiction, Baldus reaches nearly the same result in practice - but not in law.

The ultimate purpose of Baldus' reliance on possession was to reach the same practical outcome as Innocent's concept of toleration without accepting its preconditions – chiefly, subordinating the external validity of agency to the internal one. Having affirmed that Barbarius had a 'true and revocable praetorship ... while the defect remains hidden',[144] Baldus seeks to reach the outcome of Innocent's concept (its procedural consequences), skipping its (substantive) foundations:[145]

> therefore the deeds are valid as if [done] by the true praetor, albeit unworthy, who is to be stripped of his praetorship by the superior. The same applies to any *dignitas*, whether secular or ecclesiastical, because of the jurisdiction that attaches to it (as in Innocent's comment on X.1.3.13)

[144] *Supra*, note 124
[145] Baldus, *lectura ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 55*va*, n. 20): 'et ideo valent gesta tanquam a vero praetore, licet minus digno, et cui praetura per superiorem esset interdicenda. Et idem dico in omnibus dignitatibus, quia est annexa iurisdictio, sive sint seculares vt hic, siue sint ecclesiasticae, hoc sensit Inn(ocentius) extra de rescri(ptis) c. sciscitatus (X.1.3.13).'

The ambiguity of Baldus' mention of Innocent can be better appreciated looking at what Innocent actually meant. In his comment on X.1.3.13 the pope denied to the litigant parties the faculty to raise any objection against the jurisdiction of the ordinary judge on the basis of his personal status. First, Innocent maintained, the judge should be deposed from office.[146]

For the pope, the validity of the jurisdictional deeds of the (ordinary) judge[147] is a consequence of his toleration in office. The sentence is therefore valid because it is an external manifestation of the internal relationship between agent and office. Toleration in office entails the right to exercise it: to prevent external manifestations of agency, it is therefore necessary to cut the (internal) link between agent and office first. Much unlike Baldus, for Innocent the lawful possession of jurisdiction is only an external consequence of the underlying agency relationship, a tangible manifestation of the underlying right.

The slave Barbarius lacks that underlying right, so he is not entitled to the office. Baldus' position on lawful possession of the office, however, is deeply different from that of the pope. Applied to Barbarius' case, this means that the slave-praetor is neither entitled to the office *de iure*, nor does he exercise it only *de facto.* As Baldus put is, Barbarius is 'one who never was in office *de iure*, but *de facto* in coloured possession'.[148] The dichotomy *de iure* / *de facto* does not leave room to a third genus: ultimately, Barbarius is still praetor only *de facto*. But the voidable election (and so, the 'revocable praetorship') leads to the lawful acquisition of possession of the office. If Barbarius does not sit in the office *de iure*, he is no intruder either. This intermediate position is well defined in terms of coloured possession: a lawful possession of the office that, from the outside (i.e. moving from the external side of the agency triangle), would point to the underlying right of the incumbent (suggesting the validity of the internal side, without however proving it). This way, Baldus' idea of 'coloured possession' of the office is ultimately an indirect route towards Innocent's concept of toleration.

It remains to be seen to what extent can possession of the office replace its legal entitlement and, especially, what consequences can it produce.

3.5. Breaking Innocent's symmetry: external validity vs. internal invalidity of agency in the *lex Barbarius*

There is an important advantage to speak of possession of office and not of legal entitlement to it: possession allows to keep a distance between person and office. The lack of full representation, in other words, highlights the difference between the two

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[146] Cf. Innocent IV, *ad* X.1.3.13, § *Sciscitatus* (*Commentaria Innocentii Quarti* (note 27), *fol.* 12*ra*, n. 2): 'Sed quaeritur, an hae exceptiones de impotentia iuris vel facti contra ordinarium possint opponi? Respondeo, hae exceptiones locum habent contra delegatum, contra ordinarium autem quandiu toleratur in dignitate, locum non habent, ut notat(ur) infra de offic(io) delegat(i) <c.> cum super (X.1.29.23) ... Item nec praetextu infamiae vel seruitutis sententia retractabitur. Item not(andum) quod infamis non potest se excusare a iudicando, nisi excipiatur contra eum, arg(umentum) C. de decu(rionibus) <l.> nec infamis et l. infamiam (Cod.10.32.10 and 8), ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.13.4).'

[147] Clearly, Innocent referred only to ordinary jurisdiction, not also delegated one. The point is ultimately not dissimilar from the case of the bishop and of his vicar that we have seen earlier: just as only the bishop is the representative of the bishopric, and not also his vicar, so the link between office and person is only with the ordinary judge, not also with the delegate one. Cf. *supra*, § 2.2.

[148] Baldus, *repetitio ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 58*va*, n. 27): 'Quandoque quis nunquam fuit in officio de iure, sed de facto in colorata possessione, et loquitur l(ex) nostra [*scil*., Dig.1.14.3].'

subjects. The office cannot be considered as willing and acting through its agent, who can therefore exercise on it a kind of control legally weaker than full entitlement.
Moving from a bidimensional image of the office, which therefore coincides with the person discharging it, for the Accursian Gloss it was imperative that the person of the slave Barbarius became true praetor. That was the only way for the source (the person of Barbarius acting as praetor) to produce valid legal deeds. Any other solution would have jeopardised the litigant parties that relied on the validity of the source of the deeds. Hence, for public utility considerations, Accursius imputed to the Romans the presumed will to set the slave free so as to make up for his legal incapacity.
If Baldus refuses to follow the Gloss in its approach, he does not reject its public utility considerations. And those considerations require that the source of the deeds be preserved. But in Baldus the scenario is, so to say, three-dimensional: the person of the agent does not fully coincide with the office, which remains a different subject. This is all the more the case when the agent is not fully (i.e. *de iure*) legitimate to represent it. The source of the deeds is not the person vested with the praetorial powers, but the office of praetorship itself. This is why, as we have seen, Baldus speaks of 'true praetorship' and not of 'true praetor',[149] and why he refers the concept of toleration directly to the deeds and not to Barbarius.[150] Public utility is a strong argument in favour of the validity of the source of the deeds. On this Baldus agrees with the Gloss. In Baldus, however, that source is no longer Barbarius, but the office itself:[151]

> you may on the contrary say that he [Barbarius] enjoyed a true praetorship because of this *lex*, for this *lex* is based on considerations of equity and public utility. Those considerations however support the acts of Barbarius, not of Barbarius himself. Therefore his acts are valid, but Barbarius is not praetor. Just as it is possible to have the exercise of a *dignitas* where there is no *dignitas*, so it is possible to discharge the office of guardian without true wardship because of the uncertainty as to the [validity of the] appointment (as in Cod.3.31.6).[152] Equity does not favour the person of Barbarius nor his personal status. This is clear both from the fact that, running away, Barbarius became a thief and a criminal (as in Cod.6.1.1),[153] and from the fact that he sneaked up on the people hiding his incapacity

[149] *Supra*, text and note 124.
[150] On the point see also Baldus, *repetitio ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 58*va-b*, n. 27-28): 'Nam si in l(ege) nostra [*scil.,* Dig.1.14.3] essent gesta postquam depositionis sententia esset lata contra barbarium, et tunc gesta non valerent, ut no(tat) Inno(centius) de accu(sationibus) c. qualiter (X.5.1.24) in glo(sa) magna. Sin autem est alias adempta iurisdictio propter errorem ipsius, *adhuc acta tolerantur*, de resti(tutione) spol(iatorum) c. audita (X.2.13.4) et de hoc tangitur i(nfra) si cer(tum) pet(etur) l. eius, in princ(ipio) (Dig.12.1.41) et facit quod no(tandum) i(nfra) de condi(cione) inde(biti) l. si non sortem § qui filio (Dig.12.6.26.8)', emphasis added.
[151] Baldus, *lectura ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 55*rb*, n. 15): 'aut dicit eum fuisse in vera praetura per rationem huius l(egis) tunc cum ratione huius l(egis) sit aequitas, et publica vtilitas, et illae rationes faueant actib(us) Barbarii, sed non Barbario; ergo acta valent, sed Barbarius non est praetor, et sic inuenitur administratio dignitatis, ubi non est dignitas, sicut invenitur administratio tutelae, absque vera tutela ratione dubii, vt C. de peti(tione) hae(reditatis) l. si putas (Cod.3.31.6), quod enim aequitas non faueat personae Barbarii, nec eius statui (*sic*), apparet, quia fugiendo erat fur et criminosus, C. de ser(vis) fu(gitivis) l. i (Cod.6.1.1) et quia obrepsit populo tacendo suam inhabilitatem.'
[152] Cf. Baldus, *ad* Cod.3.31.6, § *Si putas* (*svper Primo, Secvndo et Tertio Codicis* (note 52), *fol.* 201*ra*, n. 6).
[153] Cod.6.1.1 stated that the runaway slave commits the theft of himself.

This passage explains why Baldus is always so careful in distinguishing entitlement from possession of the office. The accent is on the exercise of the office, which is valid for public utility reasons. But public utility is invoked for the benefit of the commonwealth, to make the deeds valid. Qualifying the deeds as valid for the sake of public utility means applying public utility directly to the relationship between office and people (i.e. third parties). The Gloss and its followers did the same but, moving from the assumption that person and office coincided, they did not distinguish the valid exercise of the office from the lawful position of Barbarius - the second was necessarily instrumental to the first.
Public utility justifies the 'exercise of the *dignitas* where there is no *dignitas*', says Baldus. The ambiguity is intentional, and it would be lost had he spoken of office (*officium*).[154] Referring to *dignitas* for both office and Barbarius, Baldus highlights their contrast. The slave remains legally incapable to represent the office *de iure*, he is *indignus* of that *dignitas* first of all in the 'technical' sense of legal incapacity.[155] The contrast between the *dignitas* of the praetorship and the *indignitas* of the slave discharging it does not abate with the intervention of public utility. Much on the contrary, public utility magnifies that contrasts, for it highlights the difference between the two sides of the agency triangle. Baldus invokes public utility directly with regard to the external side, to justify the validity of the exercise of the office for the sake of the recipients of the deeds (the litigant parties). This does not mean skipping the office entirely and invoking public utility directly towards the third parties (and so, holding the void deeds as valid for their sake), but rather using public utility to hold valid the relationship between office and third parties (and so holding the deeds valid). As with the Gloss, also in Baldus the deeds are still valid because of public utility considerations. But, crucially, those considerations now operate in favour of the external side of agency, the relationship office-thirds.

Looking at the external side of agency, in turn, calls for the internal one. This leads to the most innovative element of Baldus' approach: the exercise of the office by the unworthy who cannot lawfully (*de iure*) represent it is valid for the recipients of the deeds, not for himself:[156]

> as there may be found nothing in Barbarius but for coloured title and coloured possession, then he is praetor with regard to the others, but not to himself

[154] This intentionality seems to be indirectly confirmed by the opposite approach of Baldus in other contexts. To stress the difference between the eternal *dignitas* of the Crown and the mortal nature of its incumbent, for instance, sometimes Baldus speaks of office to describe the position of the latter. This is the case at the very beginning of his commentary on the Code, where Baldus states that the 'the *office* of the emperor is for the term of his life' (Baldus, *ad* Const. *De novo codice componendo, § Oportet preuenire, svper Primo, Secvndo et Tertio Codicis* (note 52), *fol.* 2*vb*, n. 8, emphasis added). Had he spoken of *dignitas*, the statement would have made considerably less sense.
[155] Immediately after the above passage, Baldus continues to play with the ambiguity of the term *dignitas*. This is the only time in the *lectura* on the *lex Barbarius* where he associates Barbarius with the adjective worthy (*dignus*). In so doing, Baldus does not seek to justify Barbarius' exercise of the office, but to invoke a punishment on him for having done as much: 'Barbarius was liable of several crimes, so he is worthy (*dignus*) of punishment'. This way the two-sided concept of *dignitas* strengthens the contrast between Barbarius and the office. Baldus, *lectura ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 55*va*, n. 16): 'Barbarius plura delicta cumulauit, vnde poena dignus est'. On Baldus' use of *dignitas* against the slave Barbarius see also the *repetitio ad* Dig.1.14.3*, ibid., fol.* 57*vb*, n. 10: 'Barbario autem fauere, qui decepit populum, indignum est, et maxime quia criminosus, et infamis non habuit canonicum ingressum.'
[156] Baldus, *lectura ad* Dig.1.14.3 (*ibid., fol.* 55*rb-va*, n. 15): 'vnde nihil videtur in Barbario reperiri nisi coloratus titulus, et colorata possessio: est ergo praetor quo ad alios, non quo ad se.'

Baldus' concept of 'coloured title' is the transposition of the 'coloured possession' to the internal side of the agency relationship. Strictly speaking, a coloured title does not exist. The title looks at the inner relationship between office and incumbent - either there is title or there is not. So Baldus normally refers only to coloured possession of the office,[157] since possession looks at the external side of agency. Invoking public utility, in the present case Baldus deliberately highlights the contrast between the two faces of agency. Coloured possession of the office - lawful possession without the underlying title to represent it *de iure* - allowed the slave-praetor to exercise the office. Because of public utility considerations, this exercise was valid towards third parties - that is, as to the external side of agency, the relationship between office and the people. Barbarius' praetorship is therefore not utterly void, but 'true'.[158] At the same time, however, this praetorship cannot be 'rooted' in the person of a slave because of his (legal) *indignitas*, therefore it remains 'revocable'.[159] Seen from the internal side of agency, a revocable praetorship is no praetorship at all, so the title remains only a coloured one. This is why Baldus looks first at the external side of agency, insisting on the effects of lawful possession, and only then does he move to the internal side. Because the moment the focus shifts towards the inner relationship, that between agent and office, possession becomes irrelevant. Possession can produce legally relevant consequences only to the outside - from the office to the thirds. When looking at the inner relationship agent-office, the lack of a valid title leaves only one possible conclusion: lack of agency. Because the triangle was drawn moving from the external side first, however, Baldus can both deny the internal validity of agency (person-office) and affirm the validity of the external one (office-thirds) for the sake of public utility:[160]

> it is not important to the commonwealth that Barbarius be praetor, but that the deeds be valid for the common mistake. So we may conclude that Barbarius did not enjoy a true praetorship but a putative one, and that he was praetor only in name and in the exercise [of the office] with regard to the others and not to himself, for he did not have a true *dignitas*

This passage explains further what said in the previous one: Barbarius 'is praetor with regard to the others, but not to himself'.[161] This, it may be recalled, was itself an

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[157] Baldus, *supra,* note 148, and Id., *ad* X.1.6.44, § *nichil* (*Baldvs svper Decretalibvs* (note 26), *fol.* 69*vb*, n. 10): 'Sed si ad exercendum iurisdictionem non sufficeret possessio colorata sequeretur inconueniens quod interim in re publica ius non redderetur et fieret spelunca latronum. Oportuit ergo mediam iuris dispositionem inueniri propter emergentes casus quae dilationem non recipiunt et non expectant plene discutionis euentum super proprietate ipsius iurisdictionis, istud est naturaliter certum quod facte cause: vbi gratia si latro interim suspensus est non possunt retractari quia non possunt reduci in pristinum statum'.

[158] *Supra,* text and note 124. Cf. also Baldus, *ad* X.1.3.14, § *Quoniam autem* (*Baldvs svper Decretalibvs* (note 26), *fol.* 29*va*, n. 2): 'Item quod qui demonstrat non datur quod iurisdictio potest esse absque exercitio ff. de stat(u) ho(minum) l. qui furere (Dig.1.5.20), sed interdum est exercitium absque natura et radicabili iurisdictione, ff. de offic(io) preto(rum) l. barbarius (Dig.1.14.3). Ibi exercitium in possessione fundatur imo in publica vtilitate saltem aptitudine.'

[159] *Supra,* text and note 124.

[160] Baldus, *lectura ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 55*va*, n. 15-16): 'Item non interest Reipublicae quod Barbarius fit praetor, sed quod acta valeant propter communem errorem bene interest Reipublicae: quare concluditur, quod Barbarius non sit in vera praetura, sed putatiua, et quod ipse fuit praetor nomine et administratione quo ad alios non quo ad se: quia non habuit veram dignitatem.'

[161] *Supra*, text and note 156.

adaptation of the conclusion reached with regard to the prelate secretly suspended from office, who 'may do anything as to the others, but not as to himself".[162] Baldus' analysis of the slave-praetor's case leads therefore to the full separation of the two faces of agency. He rejects the internal validity while at the same time affirming the external validity. Barbarius was praetor only 'in name' and lacked 'a true *dignitas*', so had no title to the office. But he was praetor as to 'the exercise' of that same *dignitas*: from the outside, its exercise was valid.[163] Barbarius is not true praetor, but his praetorship is valid towards the thirds.

This crucial point is further explained in Baldus' *repetitio* on the same *lex Barbarius.*[164] If 'the deeds depend on the status',[165] then public utility should necessarily be invoked with regard to the person of Barbarius (the old position of the Gloss: the validity of the deeds depends on that of their source). However, distinguishing between person and office and stressing the importance of lawful possession of the office, Baldus can reach the opposite conclusion without jeopardising the public utility argument:[166]

> although he was not praetor *de iure,* it sufficed to the parties that he was praetor *de facto* ... Therefore, if you said that Barbarius was praetor, and that his appointment had validity

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[162] *Supra*, text and note 92.

[163] In opposing the validity of Barbarius' praetorship 'to the others' and denying it 'to himself', Baldus seems to echo Belleperche's reading of the same Dig.1.14.3, although the approach of the Orléanese jurist was very different. Rejecting the validity the source and focusing exclusively on the validity of its deeds, Belleperche looked at the relationship between deed (the sentence) and third party (the litigant parties). This let him to consider the deed unlawful (*non legitime factum*) as to Barbarius, but lawful as to its recipients. Belleperche, *repetitio ad* Dig.1.14.3 (Madrid, Biblioteca Nacional de España, MS 573, *fol.*86*vb*): 'Dico immo licet ex parte ipsius non legitime fecit, tamen ex parte litigantium sic, ideo etc. Nam error communis excusat ideo etc. iuxta illud error comunis facit ius ut hic et i(nfra) de sup(pellectili) l(egata) l. iii. (Dig.33.10.3) et C. de testis l. i. [Cod.4.20.1, *sed* 'de testamentis', Cod.6.23.1].' On the subject of the *lex Barbarius,* among the Orléanese jurists Baldus shows good knowledge only of Belleperche. See esp. Baldus, *additio ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 59*rb*-*va*, esp. n. 5 and 11. On the position of Belleperche see further Rossi, *Representation and Ostensible Authority in Medieval Learned Law* (note 72).

[164] It should be noted that the same *repetitio ad* Dig.1.14.3 was also ascribed to Bartolus. See e.g. *Bartoli a Saxoferrato in Primam Digesti Veteris Partem Commentaria Cvm Additionibvs*, Basileae, Ex officina Episcopiana, 1588, pp. 115-121. The text of the *repetitio* can be found in any printed edition of both Bartolus and Baldus. Manuscript sources offer limited help on the point, because the *repetitio* may be found in a single manuscript - of Bartolus (BL Arundel 473, *fols*. 247*ra*-249*va*). Despite that, the content of the *repetitio* clashes altogether with Bartolus' *lectura* on the same *lex Barbarius* (contradicting every single section of it, with no exception), whereas it matches perfectly that of Baldus in all its parts. Some late medieval and early modern scholars rejected Bartolus' authorship on the basis that the *repetitio* refers to Aristotle, Sallust and Cicero – whose mention is wholly alien to Bartolus' style but perfectly suited to that of Baldus. See esp. Jason de Mayno, *ad* Dig.1.14.3 (*Excellentissimi iuris utriusq*[*ue*] *doctoris domini Iasonis de mayno Mediolane*[*n*]*sis Lectura in prima parte ff. veteris* ..., Venetijs, per Baptistam de Tortis, 1512, *fol.* 36*va*-*b*), and then Thomas Diplovatatius, *Liber de claris iuris consultis,* pars posterior, *s.v.* 'Bartolus' (F. Schulz, H. Kantorowicz and G. Rabotti (eds.), Bononiae 1968=*Studia Gratiana*, vol. 10), p. 275, ll. 7-13). Cf. Lepsius, *Prätor und Prokonsul* (note 1), p. 228, note 12. The question of the authorship of the *repetitio* is exceedingly complex and it may not be solved in a few lines: see again Rossi, *Representation and Ostensible Authority in Medieval Learned Law* (note 72).

[165] Baldus, *repetitio ad* Dig.1.14.3, *supra*, note 118.

[166] *Ibid.*: '... licet non esset praetor de iure, sufficit quo ad litigantes quod erat praetor de facto, C. de senten(tiis) l. si arbiter (Cod.7.45.2) et ar(gumentum) l. i de testa(mentiis) (Cod.6.23.1). Si ergo dicis Barbarium esse praetorem, et creationem suam habere ualentiam in seipsa, hoc redundat ad priuatam vtilitatem Barbarij, non ad bonum publicum ... praesupponere Barbarium praetorem esset fustra respectu publica vtilitatis, quia licet sit oppositum, valerent gesta, et seruatur publica vtilitas.'

> in itself, that would be unnecessary, for it would go to the private benefit of Barbarius, not to the common good. ... In respect of public utility, maintaining that Barbarius was praetor would be in vain: the opposite solution would suffice as to the validity of the deeds and the preservation of public utility

For the validity of the deeds - that is, for the external side of agency - Barbarius' factual exercise of the praetorship would suffice. It would, because Barbarius was not a mere intruder: Baldus saw to that by stressing the importance of the voidability of the election, which gave to the secret slave a 'true and revocable praetorship'.[167] Not being intruder, Barbarius was not wholly false praetor. At the same time, however, he was no *de iure* praetor either, being legally incapable to represent the office. This opposition is the key to separate external from internal validity of agency:[168]

> if we maintain that [Barbarius] was not praetor as to himself but that he should be considered praetor as to the others, it is necessary to explain something. One thing is to object 'you have not been made', another is to say 'you cannot be'. Where there is neither fact nor law, it is possible to raise the exception of false. Where on the contrary something is true as to the facts but not as to the law, one cannot be considered as false (*falsus*), but legally incapable (*inhabilis*)

What the slave Barbarius lacked was not the fact of the election to the praetorship, but rather the legal requirements allowing that fact to result in his *de iure* entitlement to the office. The issue therefore is not of *falsitas*, but of *inhabilitas*. *Inhabilis* is that who lacks *dignitas* in its 'technical' sense of legal capacity. This way, the question becomes very similar to that of the incompetent judge. We have seen that, for Baldus, the possession of ordinary jurisdiction allows Barbarius to impose his jurisdiction over the parties, so long as the underlying defect of servitude (and so, the legal incapacity) remains hidden or anyway not proven.[169] Discharging the office of praetor, Barbarius was not truly judge, but he appeared such to the litigants. The question is not simply a difference between appearances and reality, but between lawful possession and legal entitlement.[170] Barbarius was not true praetor, but he received lawful possession of the praetorship because he entered in office after being elected, while the *inhabilitas* remained occult. The difference between 'true praetor' and 'true praetorship' is relevant only as to the inner relationship between person and office. With regard to any third party (and so, for the external side of agency), 'true praetorship' is sufficient as to the validity of the deeds, because the deeds are not those of Barbarius but of the praetorship. Saying that Barbarius' deeds are valid only 'as to the others' denies the agency relationship with the office, and links the office directly to those subjected to its jurisdiction (i.e. the thirds parties).

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[167] *Supra*, text and note 124.

[168] Baldus, *repetitio ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 57*vb*, n. 12): 'sed tenendo, quod quantum ad se non fuerit praetor, sed quo ad alios praetor debeat reputari, tunc oportet soluere, quae alia est exceptio "tu non es creatus", alia "tu non potest esse". Nam vbi abest factum et ius est exceptio falsi, et hoc non hic, quia non erat defectus in facto sed in iure, vbi vero adest veritas facti sed non iuris, iste non dicitur falsus sed inhabilis, vt no(tatur) in de proc(uratoribus) l. quae omnia (Dig.3.3.25)'.

[169] *Supra*, note 138.

[170] Baldus, *repetitio ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 58*ra*, n. 16): '... Et sic dicatur quod Barbarius non fuit liber nec praetor, ergo fuit iudex incompetens: quo(modo) acta valent? Respondeo quo ad subditos iudex competens esse videtur, ut s(upra) dixi; sed in seipso secus. Sicut ergo non potest habere dominum, ita non potest habere iurisdictionem, ar(gumentum) de statu ho(minum) l. qui furere (Dig.1.5.20).'

The distinction between internal and external validity of agency in Baldus' approach to the slave-praetor's case is strictly dependent on the separation between person and office. For Baldus, the parties are never two (agent and thirds) but always three. Barbarius is the agent, but the agent is not fully identified with the office he represents. Insisting on the relationship office-third parties, Baldus is able to shift the question from whether the agent is entitled to validly represent the office to whether the office can validly issue the deeds. Drawing the agency triangle from the outer side and then moving to the internal side allows to reach opposite conclusions that can be both be justified. Allowing for the validity of the relationship between office and thirds (because of public utility triggered by the common mistake as to the status of the slave) does not imply also ratifying the relationship between office and agent.
The slave Barbarius, says Baldus elsewhere with metaphysical transport, 'was not in the true substance of the office'. And truth, he continues, is the other face of being.[171] It would follow that Barbarius was nothing. That, however, applies only to the inner relationship between Barbarius and the office, not to the external relationship between the office of judge and the parties of a lawsuit:[172]

> Barbarius was nothing as to himself; but he was something as to the parties litigant

The oppositon between internal and external validity of agency - the invalidity of the praetorship as to himself and its validity as to the others - is not present in previous civil lawyers. To reach it, Baldus builds on the separation between person and office of Innocent IV.[173] Between Baldus and the pope, however, there is a crucial difference: for Innocent the external validity of agency (the validity 'as to the others') always depended on its internal validity (validity 'as to himself'). Toleration allowed to overcome the *indignitas* of the person *qua* individual focusing on the person *qua* agent. And it was on that basis that the office could act validly towards the thirds. To highlight the distinction between individual and agent, Innocent brought the person *qua* agent as close as possible to the office.[174] This closeness allowed shifting the focus from the unworthiness of the individual to the enduring legal capacity of the agent (i.e. the concept of toleration in office). At the same time, however, it did not leave much room to the office as a different subject from the agent representing it. As a result, Innocent required absolute symmetry between internal and external validity of agency: the relationship between office and thirds is strictly dependent upon that between agent and office. Keeping distinct agent from office, Baldus could go beyond Innocent, and fully separate the two 'sides' of agency.

The difference between internal and exernal validity of agency is particularly evident in another *additio* of Baldus on the same *lex Barbarius*. There, Baldus moves from

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[171] Baldus *ad* Cod.7.45.2, § *Si arbiter* (*svper Primo, Secvndo & Tertio Codicis* (note 52), *fol.* 52*va*, n. 16): 'Et ideo dicunt doc(tores) in l. barbarius (Dig.1.14.3), quod licet valeant gesta tanquam solenniter facta: tamen barbarius non erat in vera substantia officij. Concordat regula philosophi dicentis: quod ens et verum conuertuntur, et vnum quodque sicut se habet ad esse sic ad veritatem, secundo metaphi(sicae).' Cf. N. Horn, *Philosophie in der Jurisprudenz der Kommentatoren: Baldus philosophus*, 1 (1967) *Ius Commune,* pp. 104–149, at 148.
[172] Baldus, *repetitio ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 58*ra*, n. 16): 'Concludamus ergo tres finales conclusiones. Prima est de Barbario quod non fuit praetor. Secunda de actib(us) exercitis quod valuerunt. Tertia quod barbarius nihil fuit quod ad se, sed quo ad litigantes aliquid fuit. Et sic casu, et fortuna populus Romanus fuit seruus, et subiectus suo.'
[173] Cf. Rampazzo, *Quasi Praetor non fuerit* (note 116), pp. 433-34.
[174] *Supra*, esp. § 3.1.

the invalid election of the prelate whose incapacity remains however occult, to look at Barbarius' case from the perspective of the thirds - and so, once again, from the external side of agency:[175]

> I rather think that the deeds are valid if [Barbarius] is in possession, if that is supported by the common mistake and it furthers public utility. I prove it this way. A prelate is bound to his subjects to render them justice, and may be compelled to do as much ... This is an obligation *in rem* (*realis*), for the *dignitas* itself is bound to its subjects to do as much, and that amounts to a real right. So it is as if the collectivity of the subjects had *quasi possessio*[176] of this right ... Hence I argue that this possession of the subjects justifies the legal proceedings in their favour because of their good faith, given that the prelate was in bad faith.

Here, the focus on the outer side of agency is even more pronounced than in most other cases that we have seen. Invoking public utility directly on the relationship between office and thirds on the one hand, and fully distinguishing between obligations of the office and of the person on the other, Baldus can even think of a real right of the third party towards the office. The obligation of the office of the judge is to grant justice to those under its jurisdiction. Described this way, the obligation clearly refers to the office, not to the person of the agent. And so Baldus qualifies it as a real right - a right against a thing, not a person. The holder of that right is the commonwealth (the collectivity of those under the office's jurisdiction), and the presence of the commonwealth allows public utility considerations. In suing before the illegitimate agent (Barbarius or the prelate), the people are exercising their right against the office. The simple possession of the office (instead of *de iure* entitlement) suffices as to its valid exercise because of the good faith of the people (which triggers public utility). But the validity is only towards the commonwealth (external validity) and not to the agent (internal validity), who has no entitlement to the office, and so no right to it.

4. Conclusion

While the second part of this study looks mainly at the case of the slave-praetor, it should not be seen in isolation from - or even in opposition to - the first. In the first part, we have focused on the physiology of representation. In the second, on its pathology. In law, the pathology of a subject helps to better understand its physiology: to make sense of a set of rules, one should look at the most problematic cases where they apply. Because defining something means first of all circumscribing it, we can appreciate the scope of a rule only by looking at border-cases. Thus the slave-praetor is not an exception to Baldus' concept of representation, but a good occasion -

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[175] Baldus, *additio ad* Dig.1.14.3 (*In Primam Digesti Veteris Partem Commentaria* (note 6), *fol.* 59*rb*, n. 9-10): 'Verius credo quod valeant gesta, si est in possessione, et communis error et publica vtilitas hoc suadent. Hoc probo. Prelatus est obligatus subditis ad faciendum eis iustitiam, et potest ad hoc cogi, in Auth. de quaestore § super hoc [Coll.6.8, § super hoc(=Nov.80.7); the same obligation may also be found in Coll.9.14.9, § super hoc(=Nov.128.23)]. Item est obligatio realis, nam ipsa dignitas est obligata subditis ad hoc, et sic ex hoc resultat ius reale. Igitur quasi possidetur hoc ius ab vniuersitate subditorum. ... Ex hoc concludo quod ista quasi possessio subditorum iustificat processum in eorum fauorem propter eorum bonam fidem, dato quod prelatus habeat malam fidem'. Cf. esp. Baldus, *additio ad* Dig.1.8.6.1, § *Vniuersitatis* (*In Primam Digesti Veteris Partem* (note 6), *fol.* 49*vb*).

[176] Baldus writes of *quasi possessio* both because that specific right lacks a corporeal dimension (cf. *supra*, note 84), and especially because a collectivity may not possess in the same way as an individual person: cf. e.g. Baldus *ad* X.2.14.9, § *Contingit* (*Baldvs svper Decretalibvs* (note 26), *fol.* 156*vb*, n. 38).

probably, the best one in Baldus' whole opus - of looking at its inner dynamics. The acts of the slave-praetor are not valid despite Baldus' understanding of representation, but precisely because of it. Normally, *causa proxima* and *causa remota* - agent and office - act in mutual harmony. This means that, when the individual office acts towards third parties, we do not see a triangle but only a segment - the relationship between person and third. Even if we do not see it, however, the triangle is there. It becomes clearly visible only when the person cannot validly represent the office, and the internal validity of agency is called into question.

In the concept of representation of Innocent IV, the office tends to identify with the person. There is however a subtle line between integration and assimilation. For Baldus, the office is never thoroughly assimilated to the person. Even when the office remains on the background and the agent is on the front, the stage, so to say, is always three-dimensional. Highlighting the direct imputation of legal obligations to the office, its separation from the agent lingers on even when the agent has full title to represent the office. So, we have seen, even the king cannot bend the office into doing something that would defile its *dignitas*. This was something that Innocent never said. When the deeds would detract from the *dignitas* of the office, therefore, they remain deeds of a private individual and may not be ascribed to the office, so they are void. The *dignitas* of the supreme office of the Crown relates to the commonwealth: the direct relationship between office and the people (the external side of agency) works as a constraint to the relationship between agent and office (the internal side of agency). Hence the main obligation of the king was preserving the state of the commonwealth (*status regni*), because that obligation was first and foremost of the Crown towards the commonwealth, to the point that it even defined the Crown itself.[177] The external side of agency - the relationship between office and thirds - helps defining the nature of public offices, and it colours that relationship with public utility.

Highlighting the external side of agency, and the public utility underpinning the relationship between public office and the commonwealth, Baldus underplays the invalidity of the internal side. Invoking public utility when looking at the relationship between commonwealth and praetorship, as Baldus does, means highlighting the obligation of the office of the judge towards the collectivity. The strength of that obligation allows to overcome the wanting status of the agent - the slave Barbarius. Both in the case of the Crown and in that of the office of the judge the principal relationship is between office and people; the one between office and agent becomes somewhat secondary. The same rationale used to deny the validity of the deeds of the true agent (the king lawfully sitting on the throne) is ultimately applied to ascribe valid effects to those of the false agent (the slave unlawfully sitting on the bench).

[177] See first of all the classical study of Post, note 19, esp. pp. 269-290. It is significant that in his discussion Post links this concept with that of the inalienability of those Crown's rights considered necessary for public utility reasons (*ibid*., esp. pp. 280-282).